AN INTRODUCTION TO BRITISH CONSTITUTIONAL LAW

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OXFORD

AT THE CLARENDON PRESS

1931

OXFORD UNIVERSITY PRESS
AMEN HOUSE, E.C. 4
LONDON EDINBURGH GLASGOW
LEIPZIG NEW YORK TORONTO
MELBOURNE CAPETOWN BOMBAY
CALCUTTA MADRAS SHANGHAI
HUMPHREY MILFORD
PUBLISHER TO THE
UNIVERSITY

PRINTED IN GREAT BRITAIN

PREFACE

THIS short sketch of British Constitutional Law has been prepared in the hope that it may serve to give the student, about to enter on the study of this great and fascinating topic, a preliminary view of the doctrines, which are set out in detail in the classical treatises of Professor A. V. Dicey and Sir William R. Anson, and whose history has been traced, with admirable erudition, by Henry Hallam and Sir T. Erskine May, and more brilliantly by F. W. Maitland. Local government has been left aside, since to treat it briefly is meaningless, but due regard has been paid to the varied forms of government existing in the Empire. Of the Dominions I have written briefly in view of my little book *Dominion Autonomy in Practice* (Oxford University Press, 1929), and have found room thus for a fuller account of recent developments in the government of the colonies, Protectorates, and Protected States, and the international experiment of Mandated Territories. In addition to the normal themes of constitutional law I have paid special attention to the issues of the relations between the executive, the legislature, and the judiciary, whose importance is sufficiently marked by the novel but welcome excursion of the Lord Chief Justice himself into the field of controversial legal literature. Technicalities have so far as possible been avoided, in order to render the book accessible to those who may care for a general view of the present state of constitutional law.

Much that is vital in our law rests not on statute, but on judicial decision, and the student cannot too early begin

the study of case law. I have accordingly referred freely to the leading cases on the subject, many of which will be found conveniently extracted and annotated in Messrs. D. L. Keir and F. H. Lawson's *Cases in Constitutional Law*. A short Bibliographical Note has been added, which will serve as a guide for further study and an acknowledgement of my obligations. For much help I am indebted to my wife.

A. B. K.

THE UNIVERSITY OF EDINBURGH,
December, 1930.

P.S. With reference to the discussion of the international position of the Dominions (pp. 169, 170) it should be noted that on March 27, 1931, it was announced at Dublin that arrangements had been made that the Irish Free State Government should advise the King directly in matters of international character in which His Majesty has hitherto acted on the formal advice of a Secretary of State. A new Seal will be used in place of the Great Seal of the Realm in instruments for the negotiation and ratification of treaties. The decision which goes beyond the policy announced at the Imperial Conference of 1930, places on the King the duty of securing harmony between the action of the British and the Free State Governments, a position which is contrary to the doctrine of constitutional monarchy. It also makes it clear that the relations of the United Kingdom and the Free State are those of a personal union, subject to the terms of the treaty of 1921, and marks the most decisive step yet taken towards the termination of the diplomatic unity of the Empire. It is noteworthy that the arrangement was made without discussion by the House of Commons before sanction of a change of far-reaching importance, thus illustrating the wide scope of authority exercised in external relations and Imperial affairs by the Cabinet.

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§ 1. *The Subject-matter of Constitutional Law.*

THROUGHOUT the British Empire we find governments engaged in a complex variety of tasks and the constant intrusion of the State into spheres once claimed for private enterprise. As primary functions of government may be reckoned the obligation to preserve peace and order in the community, and to enforce the system of private rights between its members; the maintenance of the security of the State from external aggression, and the cultivation of relations of amity with other States; the raising of the necessary armed forces on land, sea, and air, to assure safety at home and against foreign aggression; and the provision of the necessary funds to provide for the instrumentalities of government. But the governments of the Empire are expected to go much further, to foster agriculture, industry, and commerce; to regulate the relations of employers and labour; and to further the social and intellectual well-being of the people by provisions for health, sickness and old age pensions, insurance against accident, and education of every kind.

In all these diverse fields of operation there may be distinguished three aspects of governmental activity, to which the names executive, legislative, and judicial have been applied. The term 'executive' is perhaps not wholly happy, for it may lead to the impression that the function of the executive is to carry the laws into effect so far as they relate to the public services. But the true function of the executive is the direction of the policy and the administra-

tion of the affairs of the State within the limits of the law of the land. What it accomplishes under the express commands of law is but a part of its labours, and it is from the executive that the motive power for a change in the law normally emanates, evoking legislative activity. Legislative activity lies in the laying down of rules of conduct binding on the members of the State, and inseparably connected with this in practice is the regulation of the financial business of the State, the raising and expenditure of the funds necessary for executive activity. The application of the law of the State with a view to assert rights and suppress wrongs is the judicial function.

It is the object of constitutional law to consider the organs by which these functions are carried out, their interaction, and the relations which exist between the members of the State and these organs, or in other words, to determine 'what are the legal rights and duties of the various parts of the sovereign body against one another and against the community at large, and how the whole works together'. The task in the case of the Empire is excessively complex, because the English constitution represents a slow evolution, in the course of which the several functions have been differentiated without much definite planning. Hence it happens that, though we speak of the executive, the legislature, and the judiciary, we find that none of these organs is confined absolutely to the corresponding functions. Indeed, especially of late, concern has been excited by the feeling that the executive has begun to encroach seriously on the spheres of legislation and judicial decision. But this feature has its explanation in the development by reason of which the executive has come to depend upon the will of the legislature, the characteristic feature of the British constitution.'

§ 2. *The Separation of Organs and their Interrelation.*

The fact that William I virtually attained kingship in England by conquest resulted in the combination in the hands of the sovereign of all forms of authority,[1] which he exercised with the advice and consent of his Council, composed in practice of great nobles and of officers in attendance on the King. But the authority thus wielded was limited; legislation in the main consisted of edicts enforcing customary law or enacting administrative changes, and royal justice had slowly to win its way against the local courts and the jurisdiction exercised by feudal lords. The strength of the State could only be manifested, when the King's power rested on a broader basis than his Council, and adequate funds for an effective centralized rule could be granted only by a body more authoritative and representative than a mere conclave of tenants in chief. Edward I's Parliament of 1295 was based on inviting the assistance of the barons, the clergy, and the commons, represented by two knights elected by each county, two citizens for each city, and two burgesses for each borough. Gradually Parliament developed into two houses, Lords spiritual and temporal, and Commons, and the right of the latter to share in taxation and legislation was conceded. While the legislature thus attained a certain coherence in form and function, the King's Council remained in effective control of executive functions. Under the Lancastrians the executive for a time became dependent on Parliament, the King's Council being actually nominated in it, but this solution of the relations between Parliament

[1] This authority is the royal prerogative, executive, legislative, and judicial, and at the present time 'prerogative' is that portion of the royal authority in these spheres which has not been taken away by statute. Many prerogative powers have been converted into statutory authority, and new powers have been conferred by statute; see § 5, below.

and the executive was premature. The Crown lacked the necessary power to enforce order; and the inevitable outcome of the disorder of the Wars of the Roses was the establishment of a strong monarchy based on the destruction of the great rival families. The Council ceased to have any control over the King, who instead controlled its composition and filled it with officials of his own selection. The Church through the Reformation lost prestige and wealth as well as the numerical preponderance in the House of Lords. The Commons were ready to accept the will of a King who secured peace and order. Hence the King now controlled his Council and Parliament. The latter presented a convenient and authoritative means of taxation and legislation, and it was by the instrumentality of Parliament that the Tudors normally worked. Nothing is more characteristic than the fact that Henry VIII obtained from Parliament an enactment to give his proclamations the force of law, a power repealed under Edward VI. Elizabeth continued her father's policy, of acting through Parliament, securing its acquiescence by the creation of small boroughs, whose members would be subservient to the wishes of the Court.

It is easy, therefore, to understand the view held by Bacon of the function of Parliament. He regarded it as a most valuable adjunct to the King, an excellent instrument for the voting of taxes, the passing of legislation, and the keeping of the Crown in touch with the opinion of the realm. But the strong government of the Tudor period had created a new spirit in the people. A middle class had sprung up, wealth and education had increased, fear of lawlessness and the disposition to accept a dictatorship rather than risk anarchy had diminished, and the spirit of Protestantism questioned arbitrary power. It would doubtless have been necessary even for a Tudor to make

concessions, but the fatal difficulty which arose was largely due to the fact that the Stuarts were aliens, whose advent disturbed the organic unity which had existed in the exercise of sovereign power. The Tudors had enormously augmented the legislative authority of Parliament by successfully asserting its authority to deal decisively with the religion of the State, thus negating the doctrine that the legislature was bound by the law of God as interpreted by the Church of Rome. James I for his part was imbued with the doctrine of the divine right of princes and their semi-divine authority, and in effect he claimed for himself as against Parliament full sovereign power. He had, of course, much influence to support his thesis, both in the House of Lords and in the Commons which Elizabeth had long dexterously controlled. Moreover, he could in great measure rely on the judiciary to support his claims, though Coke convinced him that he could not actually exercise in person judicial functions.[1]

The judiciary had by this time achieved separation as a distinct organ from the executive and the legislature. The twelfth century saw the institution of a special bench, the Common Pleas, to try suits between subject and subject, though the King with his Council, the King's Bench, remained still the final judicial authority. In the thirteenth century the King's Bench emerges as differentiated from the King in Council; later the judicial side of the financial board of the Exchequer took its place beside the two Courts of Common Law, and by the sixteenth century the separation of executive and judiciary was fairly complete, the Court of Chancery being divided from the King's Council. But over the Courts the King possessed effective control through the power to appoint and dismiss the judges, and apart from this the King claimed a power of

[1] *Prohibitions del Roy* (1607), 12 Co. Rep. 63; Keir & Lawson, p. 276.

jurisdiction superior to that of the Courts and not subject to their control, which was exercised by a Committee of the Privy Council, for a time more formally organized in 1487 by the so-called Star Chamber Act.[1]

With such judicial support the King was not ill-equipped to contest sovereign power with the Commons, and the appeal to the Courts gave birth to most far reaching decisions on constitutional law, and to their rectification and supplementing by Acts of Parliament. If the King possessed sovereign power, he must be able to legislate, and James I had no scruples in interfering by proclamation with personal liberty and freedom of trade; he bade country gentlemen repair to their homes and there maintain hospitality, forbade the increase of building in London, and the making of starch out of wheat. He might rely on Tudor precedent and could make out a fair case, but the judges under the instigation of Coke proved for once hostile.[2] Coke was too much enamoured of the Common Law to allow force to the royal claims of unfettered sovereignty, and the judges laid down the momentous doctrine that the King had no prerogative save what the law of the land allowed. This declaration meant, when its implications were fully considered, that the authority of the King was not to be determined by his will, but was definitely limited by a superior authority, the law of the land, which was to be gathered from statutes, judicial decisions, and the customs of the realm. In the special case of proclamations the law of the realm, the judges held, gave the King no power to create any new offence, punishable by fine or imprisonment; he might, however, warn his

[1] The Star Chamber Court did not rest on the statute, but on the wide jurisdiction of the Council, though its abolition by 16 Chas. I, c. 10, treats it as statutory.

[2] *The Case of Proclamations* (1611), 12 Co. Rep. 74; K. & L. p. 63.

subjects against the breach of the laws, and such a warning would cause a breach of the law to be an aggravated offence. No proclamation could make an offence punishable in the Star Chamber if it were not so apart from the proclamation. The vagueness of the last pronouncement is explained by the inability of the judges then to set bounds to a jurisdiction, which after all represented the ancient authority of the King in Council. But the doctrine at least is laid down that, where means already exists of punishing offences, the King cannot create a new Court to try them.

The sequel to this decision is interesting, as it shows the importance of the existence of judicial means of enforcing law. Neither James I nor Charles I refrained from issuing proclamations with more extended effect than the judges ruled proper, and so long as the Star Chamber existed it was possible to enforce them by punishment. The abolition of that Court and of the jurisdiction of the King in Council by the Long Parliament struck an effective blow at the issue of legislative proclamations for England. In 1766, when in time of stress, in order to prevent grave scarcity, the government, in defiance of statute authority for the free exportation of wheat, laid an embargo on its removal from England, this 'forty days' tyranny' was duly indemnified by Act of Parliament, after ministers had been fiercely assailed for their breach of law.

In matters of taxation, however, the Stuarts attained greater success. The right to control foreign trade was conceded by the judges in *Bates's* case[1] and was held to permit of increases in import duties, despite the fact that under the name of tunnage and poundage Parliament had since 1373 regularly granted customs on wine and merchandise to the King. The decision passed muster for the

[1] (1606) 2 St. Tr. 371; K. & L. p. 36.

moment, doubtless because it was so largely based on the ground that the King must have the power to regulate relations with foreign countries, even if by doing so he might as an incident raise revenue. Its danger was felt only when in 1608 the King largely increased rates, thus assuring himself an increase of revenue calculated to diminish his dependence on Parliament, and in 1610 a remonstrance was drawn up in the Commons for presentation to the King, in which the effort was made to show that the royal action was contrary to precedent and inconsistent with the statutes. It was a grave difficulty that Mary and Elizabeth had exacted impositions, but nonetheless it was clear that the essence of the statutory provision had been to restrict the power of the Crown, and that the action of James I violated the spirit of the constitution. Yet Parliament was slow to vindicate its claim; it was only in 1640 that the Long Parliament established the rule that no export or import duties might be levied on subjects or aliens without the assent of Parliament.

Yet another mode of filling the royal treasury was attempted by Charles I, that of forced loans. When Darnel and four other knights refused to pay the sum assessed on them, they were brought before the Council Board and committed to the Fleet prison. An effort to secure their release on a writ of *habeas corpus* failed, for the judges held that the assertion that the detention was authorized by the special command of the King was an adequate return by the Warden of the Fleet to the writ.[1] In this case action was more speedy; the Petition of Right in 1628, assented to by the King, admitted that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge without common consent by Act of Parlia-

[1] *The Five Knights' Case* (1627), 3 St. Tr. 1; K. & L. p. 37.

ment. Moreover, it was conceded that no freeman should be forejudged of life or limb, or imprisoned, or detained against the terms of the Great Charter and the law of the land. At the same time a further attack was delivered by Parliament on the royal attempt to exercise judicial authority, for it was forbidden to issue commissions for the trial of alleged offenders by the law martial as used by armies in time of war. In this way Parliament sought to maintain the distinction of judicial and executive power and to subject the exercise of the latter to the control of the Courts of Common Law.

But the control of the Courts was destined to prove disappointing. In the great case of *Shipmoney*[1] the issue was raised whether it was within the royal prerogative to issue orders for the creation of a fleet at the cost of the taxpayers, and by seven to five the judges of the Court of Exchequer held that the King had the power demanded, either on the ground that he must in the nature of things possess the power of raising funds for the defence of the country without the necessity of waiting until grants could be made by Parliament, or, more simply, on the score that the law was no more than the servant of the King, his instrument of government, and the King himself was law 'lex loquens, a living, a speaking, an active law'. Hampden's resistance to a payment in his case of no more than £1 was justified by principle, but, though the grounds of the Court's decision menaced liberty, they revealed a very real dilemma. Under the conditions of the time there might well arise urgent need for expenditure, and grave injury might arise from the necessity of summoning Parliament to deal with an unforeseen crisis. Yet the alternative of admitting, as did the Court, the royal discretion was to subject the country to the possibility of unfettered

[1] *R.* v. *Hampden* (1637), 3 St. Tr. 825; K. & L. p. 39.

monarchic control, since need for funds was the main purpose to induce the summoning of Parliament.

The true remedy for the difficulty was seen by patriots such as Eliot and later Pym, and the Grand Remonstrance of 1641 demanded that the King should employ at home and abroad such counsellors and other ministers as the Parliament might have cause to confide in, since otherwise Parliament could not grant him the supplies desired for the support of home and foreign policy. This claim for Parliament to control policy was a thing repugnant to the school of statesmen familiar with the doctrines of Bacon and Strafford, who could admit merely that Parliament should give information regarding the wishes and needs of the people, and the divergence of view cost the country a civil war and the King his life. But what is significant is that Cromwell was as reluctant as the King himself to assign to the legislature power to control the executive. His views, as set out in the Instrument of Government, envisage a strictly subordinate part for Parliament, and he would have denied it the power to change fundamental principles of the constitution. Parliament declined to accept this restricted role, and was hastily dissolved, but its successor, now strengthened by an Upper House, failed equally to meet the Protector's needs; it refused to restrict itself to legislation, demanding the right to revise the constitution and to criticize the executive. Whether Cromwell would have advanced further towards the point of view of Parliament is uncertain; the restoration was rendered inevitable by his death.

The restoration of monarchy was bound up with the assertion of the authority of Parliament and disapproval of rule authorized by military power. The power to legislate and to tax was admitted to rest with Parliament, which speedily insisted on further definition of the seat of

authority in taxation, the Commons asserting successfully the right to initiate and denying the Lords any power save of mere rejection of money bills. Moreover, specific appropriation of grants marked the determination of the Commons to prevent the Crown evading its control by applying to uses displeasing to it funds granted without precise definition of the purposes for which they might be employed, and precautions were taken to secure that the grants were duly applied. For the rest the King remained free to choose his own ministers, and the only control available to the Commons lay in the power of impeachment as directed against Clarendon and Danby. Sir William Temple in 1679 sought to bridge the gulf between King and Commons by the device of the creation of a large working Council, representative of all aspects of opinion, by whose advice the King would act, but the absence of any unity in such a body would have destroyed any chance of its successful operation, even had the King desired to make full use of it. The King, however, wisely declined to break absolutely with the Commons, whose composition he sought rather to mould in his favour by the proceedings of his last years, vacating the charters of the boroughs, and granting new constitutions likely to secure their representation by members amenable to royal persuasion. James II, however, was led by his devotion to his adopted religion to try to overcome Parliamentary power. Success attended his effort, in *Godden* v. *Hales*,[1] to obtain judicial approval of his claim that he could dispense a Roman Catholic from taking the oaths of supremacy and allegiance, and from receiving the sacrament according to Anglican rites as required by statute. Emboldened by the declarations of the judges of his power to dispense with statutes, the King took the logical and convenient step of

[1] (1686) 11 St. Tr. 1165; K. & L. p. 55.

issuing in 1688 a Declaration of Indulgence, suspending the operation of all penal laws against Roman Catholics and other nonconformists. There could be no doubt of the meaning of this action; when the Archbishop of Canterbury and six bishops[1] petitioned the King to be excused from reading the Declaration as commanded, they were charged before the Court of King's Bench with seditious libel, and their only defence could be that the Declaration was illegal, so that they could properly beg to be excused reading it. The jury declined to find the accused guilty; doubtless they had weighed well the warning of Powell J. who insisted that, if the dispensing power existed in the sense contended for in the Declaration, there would be 'an abrogation and utter repeal of all the laws; . . . there will need no Parliament. All the legislature will be in the King, which is a thing worth considering, and I leave the issue to God and your consciences.' To enforce his views on the people the King had made tentative steps to provide himself with a standing army, but, in the crisis produced by his efforts to force his religion on a reluctant country, the instrument prepared failed completely, and the revolution marked a new epoch in constitutional law.

§ 3. *The Separation of Powers and Responsible Government.*

The decision of Parliament to declare vacant the throne by reason of the flight of James II, and to offer it to William and Mary, terminated the Stuart doctrine of the inherent divine right of kings, and negated the corollary of the duty of passive obedience, which divines of the Church of England as well as political theorists had espoused. Instead, it made tenure of the Crown conditional on acceptance of the established religion of the State, and it defined the line of succession to the exclusion of the natural heirs. The

[1] (1688) 12 St. Tr. 183; K. & L. p. 57.

King could no longer claim any better right to authority than had Parliament itself. That body took due care to assure its own existence and independence. Parliaments ought to be held frequently for the redress of grievances and preserving of laws; the Triennial Act of 1694 insisted that its maximum duration should be three years, and continued the rule, enacted in 1664, that it must not be intermitted for a longer period. Elections must be free, and freedom of speech and debate must not be questioned outside Parliament. The prerogative power to raise money without parliamentary grant was once more declared illegal, and the same condemnation was meted out to the pretended power of suspending laws without parliamentary sanction. The power of dispensing from laws as lately exercised was also condemned, though without an absolute denial of any dispensing power. Not less important was the provision that the raising or keeping of a standing army in the kingdom in time of peace without parliamentary authority was illegal. The necessity of such a force to a king with important projects on the continent, and in constant danger of a rising in England or Scotland in favour of the deposed monarch, was plain, and Parliament, by giving no more than annual sanction for the maintenance of the force and its discipline, effectively secured that the King should not fail each year to meet his Commons in conference. The same result was achieved by an innovation in the sphere of finance. The King had hitherto been in possession of the revenues of the Crown lands, supplemented by the proceeds of taxation granted for his life, which, carefully managed, might suffice to cover the normal expenses of government. Parliament now assigned to the King sums deemed sufficient for the maintenance of the royal household and the civil government, but provided merely by annual grants for naval and

military expenditure, which it thus retained under its control.

Nor was Parliament unmindful of the judiciary, whose scandalous subservience to the King had reached classical form in the attitude of Jeffreys. The effort to revive the judicial powers of the Crown through the establishment of the Court of Commissioners for Ecclesiastical Causes was pronounced illegal. It was laid down that jurors ought to be duly impanelled and returned; that excessive fines should not be imposed; and that cruel or unusual punishments ought not to be inflicted. The Habeas Corpus Act of 1679, extracted from Charles II, had already done much to secure the liberty of the subject, and one defect in its operation was aimed at in the requirement that, when offences were bailable, excessive bail should not be demanded. The further step of securing the independence of the judiciary by depriving the Crown of the power of dismissal at will was left to the Act of Settlement, but the revolution had already rendered it impossible for the King to attempt, even had he so desired, to treat the judges as Charles II and James II had done.

The King, however, remained invested with the executive power. It is true that by this time it was the rule that the King's acts should be evidenced by counter signature or use of a seal, but the officers of State who signed or sealed were dependent on the royal pleasure. There did, however, exist some slight check on his action through such agents; Danby's impeachment in 1679 had been proceeded with, though it was shown that the letter on which the attack was based, and in which he offered neutrality to France, bore the endorsement of the King himself, and a minister might therefore beg to be excused from action against which his sovereign might prove unable to accord him effective protection. Nevertheless, it may fairly be

said that the constitution did exhibit a certain balance of powers at this period, and it was certainly understood in this sense by Blackstone, when he fixed at 1679, after the Habeas Corpus Act was passed and that for licensing the press had lapsed, the theoretical perfection of English public law, and by Charles James Fox, when he declared this 'the best moment of the best constitution that human wisdom ever framed'. In the separation of powers, as he conceived it to exist in 1748, Montesquieu saw the mode in which was secured the protection of liberty which, in his view, was the direct object of the English constitution. Legislative, executive, and judicial authority must rest with separate and distinct powers, else there will be tyranny; freedom is the result of the check maintained on each by the others. The theory, though based in part on an imperfect apprehension of the real character of the English constitution of his day, captivated the minds of the framers of the constitution of the United States, and of the framers of the constitutions of the French Republic, but it is clear that even for the purpose of securing individual liberty the mere separation of powers might well be inadequate. The dissenters in England long suffered needless hardships through the unity of the King and Parliament alike in distrusting them. Moreover, real independence as between the King and Parliament was incompatible with effective government for positive purposes. Full regard to the national interests could be expected merely if there were harmonious co-operation, and in fact the constitutional history of the eighteenth century was bound up with the effort to achieve a working arrangement.

At first it seemed as if the King, possessed of means to secure votes in the Commons and Lords by bribes or grants of honours and office, might secure undue control

over the legislature, and the Act of Settlement proposed to exclude from the Commons, from the time when the House of Hanover attained the throne, all persons holding places of profit under the Crown or pensions. Moreover, all business belonging to the Privy Council should be there openly discussed, and the resolutions signed by those assenting thereto. Had these clauses ever been carried into effect, the emergence of responsible government might have been negated, but fear that the rule of the exclusion of members of the Commons from possibility of office would result in the royal officers appearing in the Lords induced amendment in 1705–7, which excluded from appointment to the Commons only holders of new offices, requiring holders of old offices merely to seek re-election. The repeal of the requirement of discussion in the Privy Council and signature left open the way for the development of secret discussion by a group of closely related ministers, the basis of the Cabinet system.

The true solution of the relations between Crown and Parliament could not be found under a masterful king like William III, who chose his own ministers, even if he accepted the advice of Sunderland in favour of extending a more generous share of office to the Whigs. But the advent to the throne of Anne, and the transfer of the succession to a Hanoverian king, whose ignorance of English rendered him willing to abandon the practice of presiding over the meetings of his chief ministers at which policy was discussed, rendered the way open for the passing of power to a group of Privy Councillors charged with the control of the chief offices of State, and imbued with like principles, prepared to work under the general supervision of a first minister, and resting on the support of a majority of the members of the House of Commons. Anne's acceptance of the necessity of handing over power to Whig

ministers in 1705, despite her own Tory prejudices, is the first clear illustration of the force of the new doctrine, and it was followed in 1710 by her transfer of power to the Tories when she felt, as the event proved rightly, that the country was prepared for a change of government, and by her grant to the new ministry of a dissolution from which they emerged in triumph. To Walpole belongs the credit of establishing the system on a firm footing during the period when he was first minister (1721–42). The absorption of George I and George II in the affairs of Hanover and their dislike of English politics secured him their firm support, while his determination to remain in the Commons and his devotion to establishing the supremacy of that house in finance definitely transferred to it the leading power in the State. His ascendancy in the Cabinet was reinforced by his preference for peers as colleagues, which left him in a commanding position as controller of the Commons and of the public purse.

In one respect, however, the system of responsible government thus created rested on a false foundation. Walpole used persistently and effectively the means of corruption at his disposal to maintain a majority for himself in the Commons and the Lords. Places and pensions, shares in governmental contracts, and direct money payments secured waverers, while the restricted franchise in the boroughs and the venality of the electors rendered it easy and profitable from the political point of view to traffic in purchasing seats. A just nemesis for reliance on these means was seen in the effort of George III to restore the authority of the Crown by the creation of a personal following by like methods carried out on a larger scale, and reinforced by the grant of shares in loans on terms seriously unfair to the public. The disaster of the American revolution was greatly assisted by the royal control of

policy, and the remedy for the unsatisfactory state of government, the reform of parliamentary representation, was most unhappily delayed by the struggle with France, and the reactionary tendencies which it encouraged. Not until the Reform Act of 1832 was the sound basis for the scheme of responsible government established by the extension of the franchise and the disappearance of the rotten boroughs. Though the franchise was to receive further wide extensions by the Acts of 1867, 1884, 1918, and 1928, these measures merely carried out the principle of the Act of 1832 by according the vote to those classes of the population whose fitness for the franchise was reasonably demonstrated.

§ 4. *The Development of Constitutional Law in the Colonies and India.*

The accession of James I to the throne of England brought with it the union of the Scottish and the English Crowns in a mere personal union, which, however, the Courts held to confer on Scottish subjects born after the union of the Crowns the status of natural born English subjects. Otherwise Scotland remained wholly independent constitutionally of England, until Cromwell's conquest temporarily resulted in the creation of a common Parliament for England, Scotland, and Ireland. With the fall of his régime Scotland resumed her independence, until the unfortunate treatment meted out by William III and his advisers to the national demand for colonial expansion, as evidenced by the Darien Company, resulted in the growth of a bitterness in the northern kingdom which under Anne menaced the separation of the Crowns at her demise. The solution was union in 1707 accomplished by legislation in both countries. The legislation was of great constitutional significance, for it virtually

meant the extinction of two legislatures, merging both in a new legislature with sovereign powers. Efforts were made to exclude certain Scottish matters from the power of alteration, including the judicature and religious arrangements; but, though the principle has prevailed in the main that no changes in these matters shall be effected save in clear agreement with the views of the people of Scotland, there have been exceptions, the most mischievous being the establishment of private patronage in the Scottish Church by Anne's Tory ministry in 1711, an act whence was to spring the disruption of the Scottish Church which was healed only in 1929. Legislation and administration, on the other hand, passed unquestionably to the new Parliament of Great Britain, in which room was found for sixteen peers elected for each Parliament by the peers of Scotland, to whose members no further additions might henceforth be made, and forty-five members of the Commons, whose lack of interest in English affairs rendered them amenable to bribery. The union, though deeply unpopular in Scotland at the time, proved abiding by reason of the enormous commercial advantages conferred by the removal of restrictions on Scottish oversea enterprise.

Ireland stood in a very different position from Scotland. It was a dominion of the Crown and not of the King; it was subject to the superior authority of England, and Poynings's Act in 1495 precluded its Parliament, which until James I's reign represented only the English settlers as opposed to the native Irish, from passing any legislation which had not been approved in advance by the King in Council. Under Charles I claims of legislative independence were rejected by the English Parliament, and William III's Parliament insisted on legislating freely for Irish affairs, internal as well as external. A trial of strength followed in 1719, when the British Parliament replied to claims of

exclusive appellate jurisdiction by the Irish House of Lords, by enacting in clear terms both the judicial and the legislative subordination of Ireland to England. It is not surprising that patriots resented this inferiority, or that advantage was taken of the crisis of the American revolution to present England with the convincing argument of an armed force, whose attitude would depend on the acceptance or rejection of the Irish demands. The commercial disabilities imposed by English interests were swept away in 1780, and in 1782 and 1783 the subordination of Ireland to England was emphatically renounced, first by the repeal of the Act of 1719, and secondly, to avoid doubts, by express renunciation of any right of superiority. Poynings's Act was repealed by the Irish Parliament itself, and Ireland became united to England and Scotland only through the King. But Ireland remained in a position far less satisfactory constitutionally than England, for the ministry was not responsible to the Irish Parliament, and that Parliament was closed to Roman Catholics, though they were granted the franchise. It is not surprising that the relation between the countries caused uneasiness to the British Government, nor that in the interest of security it was deemed necessary, by lavish bribery and grants of offices and honours, to secure legislation in Ireland accepting union with the United Kingdom in 1801. The result, of course, was that unrest prevailed in the relations between Ireland and England, leading at last to the introduction in 1885 into British politics of the issue of Home Rule. The measure to this effect, passed at long last in 1914, was suspended through the outbreak of war, and rebellion in Ireland in 1916 was followed by guerilla warfare, which the grant by an Act of 1920 of extended self-government to Northern and Southern Ireland as distinct entities failed to terminate.

Northern Ireland reluctantly accepted the new régime, soon learning to appreciate it, while in Southern Ireland hostilities were finally terminated by a treaty of 1921 between representatives of the British Government and the rebels, under which the Irish Free State was called into being with the status of Canada.

It was fitting that the Free State should thus assume a status of colonial type, for in many respects Ireland had been treated by English statesmen on the same footing as the colonies. Serious efforts at colonial settlement belong to the early Stuarts, who granted charters to companies or fiefs modelled on the Palatinate of Durham, or erected royal colonies. In all cases the influence of English political institutions compelled the establishment of representative legislatures, which Charles II and James II would gladly enough have abolished, when they found that their existence menaced the success of their efforts to make the colonies effectively subservient to the interests of English trade. The revolutionary settlement saw the abandonment of this effort, and the régime of *laissez faire* under Walpole allowed the Assemblies to gain a preponderating position in each colony. Their control of finance effectively precluded the Governors from maintaining power over the administration, and the restrictions on colonial trade imposed in the interests of England were far from rigorously enforced. The French and Indian war of 1756–63 proved fatal to the continued dependency of the American colonies on the Crown. On the one hand, the elimination of France as a menace to their security destroyed a powerful inducement to the colonies to accept the Imperial connexion; on the other, the necessity of maintaining a substantial Imperial garrison induced the British Government to exercise the power of imposing taxation avowedly for revenue purposes, and not merely

for the control of trade. Serious grievance on this score hardly existed, so small were the amounts involved, but the constitutional right of the Parliament to tax was stoutly denied, on the ground that no taxation without representation was a sacred principle of the British constitution which no Imperial Act could violate, and, when this position proved incompatible with the admission of any right to legislate at all, the final step was taken of denying in toto Imperial legislative supremacy. The colonies now claimed that their connexion with the United Kingdom was merely through the Crown, and, when the Crown refused to adopt the view that the Imperial Parliament could not bind the colonies, a doctrine solemnly asserted in 1774, war became inevitable, with the ultimate loss, owing to French intervention, of the continental colonies in America.

The conclusion drawn by British politicians from the loss of America was that free institutions could not consort with Imperial sway. As early as 1774 the promise of a replica of the British constitution made to induce settlement in Canada was violated, and control was vested in a Governor with a nominated Council. The new colonies in the West and East Indies and in South Africa acquired during the Napoleonic wars were denied representative institutions, doubtless with sufficient reason in view of the unfitness of the population for self-government, and the settlement of Australia on the basis of penal stations justified a like policy there. In Canada itself it was felt necessary in 1791 to meet the demands of the refugees from the former American colonies and to concede representative government, but the safeguards which accompanied it left the legislatures in the two provinces, Lower and Upper Canada, into which Quebec was now divided, utterly powerless to influence for good the administration

of the territories. The Governor was no longer helpless before the legislature as in the American colonies; he had funds at his disposal, largely from Imperial grants; he had troops to support him, and he was aided by a Council of his own nominees, who by their membership of the Upper House of the legislature checked effectively any attempts of the Assemblies to assert themselves. The lack of accommodation of views had the inevitable result of revolts in both Canadas in 1837, followed by the momentous mission of Lord Durham as High Commissioner. His suggested solution, the application in all matters not of Imperial concern of the principle of ministerial responsibility, was declared in theory impracticable by Lord John Russell, but in practice it was conceded when, acting on Lord Durham's advice, the two Canadas were reunited in 1840, and by 1847 Lord Elgin had set the system in practical operation. It was inevitable that it should be extended without delay to New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland, nor could it be refused to the Australian colonies, New South Wales, Victoria, South Australia, and Tasmania in 1855–6, Queensland in 1859, and Western Australia in 1890. In South Africa representative government was conceded in 1851–3 to the Cape, and then extended in 1856 to Natal; responsible government waited until 1872 and 1893 respectively. The conquest of the Transvaal and the Orange River Colony in 1900–2 was followed by brief periods of control by Governors with nominated Councils, but in 1906 and 1907 full responsible government was conceded. New Zealand was granted representative government in 1852, and four years later responsible government was in operation.

The grant of responsibility led to fresh groupings, though but tardily, save in the case of Canada where the risk of

pressure by the growing strength of the great Republic stimulated action, and where, moreover, federation was gradually recognized to be the sole mode of solving the deadlocks in the united province of Canada, with its French and English halves. The intervention of the Imperial Parliament was requisite to effect federation, which was accomplished under the British North America Act in 1867, the two Canadas, now separated as Ontario and Quebec, being united with Nova Scotia and New Brunswick as the Dominion of Canada. The Dominion was able to undertake control of the lands included in the Charter of the Hudson's Bay Company, granted by Charles II in 1670, and now purchased from the Company, and from these lands were gradually evolved the provinces of Manitoba (1870), Alberta, and Saskatchewan (1905), while British Columbia and Prince Edward Island accepted inclusion in the Dominion in 1871 and 1873, Newfoundland alone remaining so far outside the federation. In Australia matters moved far more slowly in the absence of any foreign danger, but ultimately economic conditions and a sense of common interests, rather than need for defence, induced the federation of the Commonwealth effected by the Commonwealth of Australia Constitution Act, 1900, from which New Zealand remained aloof. In South Africa federation was long contemplated and a futile effort made in 1875–7 by Lord Carnarvon as Secretary of State to hasten its advent. Ultimately in 1909 not federation but union was brought about by pressure of economic conditions, especially issues of railway rates and customs tariffs, supplemented by considerations of native policy, and stimulated by the desire through union to minimize the possibilities of British intervention in South African policies.

The evolution of the colonies was accompanied neces-

sarily by the steady diminution in Imperial control until the equality of the Dominions, Canada, the Commonwealth, New Zealand, the Union of South Africa, and the Irish Free State, in status with the United Kingdom was proclaimed as a fundamental principle at the Imperial Conference of 1926 and carried to its logical conclusion by the Conferences of 1929 and 1930.

While the territories mainly occupied by Europeans were thus being granted self-government, the colonies whose inhabitants were mainly non-European gradually ceased to enjoy representative institutions. The enjoyment of such institutions proved incompatible with the determination of the Imperial Parliament to abolish slavery, and though repugnance to interference with representative government prevented the Melbourne ministry in 1839–40 from persisting in the proposal to suspend the constitution of Jamaica for recalcitrance, the inability of the island to carry on effective government under this system was revealed by a negro insurrection in 1865, which induced the legislature to abandon its functions and leave it to the Crown to establish a new constitution of non-representative character. Economic conditions and lack of interest combined to induce further surrenders of West Indian representative constitutions to be replaced by legislatures mainly or wholly nominee, which would act in accordance with the wishes of the Governor under the control of the Imperial government. Similar forms of government were accorded to the colonies acquired in the east and in West Africa, and to the protectorates, which in the eighties sprang up as a new form of governmental control of African native areas, and of island territories in the Pacific. In all these cases the denial of representative government has been based on the necessity of the Imperial government retaining power to safeguard the interests of natives

unfit for the grant of the franchise, who would be subject to risk of exploitation if representative institutions were established. In cases where natives can safely be allowed to have the vote, other considerations apply, and in 1930, after several experiments, the decision was reached of giving to Ceylon a novel form of constitution, under which very wide powers of self-government fall to be exercised on a modified form of responsible government.

A further complexity to British constitutional law was added by the creation under the Covenant of the League of Nations of the mandatory system, and the allotment to the United Kingdom and the Dominions of certain Pacific, Asiatic, and African territories in mandate.

Indian constitutional history began on the lines of a chartered company as in Virginia and Massachusetts, but with the salient difference that, whereas the American companies operated in territories scantily populated by natives of slight political development, the East India Company was confronted by native governments of considerable power. Hence only very slowly was territorial sovereignty obtained, under local suzerainty as in Madras and in Bengal, or by gift from Portugal as at Bombay, where first complete sovereign authority rested with the Crown. The expansion of the Company's authority was attained essentially in Bengal in 1757 and the following years, when by armed intervention, followed by agreements with the Nawab of Bengal, and the titular Emperor of India, the Company acquired direct control of the financial and civil administration of Bengal, and through the virtual control of the Nawab determined the administration of defence and criminal justice. To satisfy itself with that position was impossible, even had the Company so desired, and its advance was favoured by the fact that the Imperial Parliament felt it necessary in 1773 to intervene and to

assert British sovereign authority by subjecting the Company's government to Imperial control. A long series of wars resulted in the addition to the territories administered by the Company of the greater part of India, while the remaining States were bound by ever closer ties of agreement to the suzerain power. Contemporaneously the Company ceased to afford any formal recognition of the titular position of the Emperor, and the participation of the last occupant of the throne in the Sepoy revolt of 1857 resulted in the extinction of the dynasty and the proclamation of the Queen as sovereign, the administration being taken away from the hands of the Company, and assumed directly by the Imperial government. The form of government, which under the Company had been strictly autocratic on the established Indian model, remained so under the Crown, and, though legislative bodies were set up both for the supreme government in India and for the provinces from time to time, these remained nominated bodies without powers other than of legislation. Slight extensions of authority and an approach to election of a few members were conceded in 1892, and the reforms of Lords Morley and Minto in 1909 increased the size of the legislatures, accorded non-official majorities in some provinces, and extended considerably the scope of the authority of the legislatures by permitting discussions of resolutions and the budget and an extended right of questioning the administration. The services of India in the war of 1914–18 led to the vital decision to guide India along the path to responsible government by gradual stages under the authority of Parliament, and in 1919 the Government of India Act provided for a complex transitional constitution, which introduced into India a slight instalment of responsible government. The mode of extension of the scheme is now under consideration.

§ 5. *The Sources of Constitutional Law.*

The constitution of the United Kingdom, as the sketch of its development shows, has evolved with a minimum of conscious efforts at formal expression. The efforts at such expression during the Interregnum perished without leaving any substantial trace. This absence of precise definition is in complete accord with the essential fact of the sovereignty of Parliament. The King, when legislative authority rested with him and his Council, and Parliament, when it took his place, were in no wise inclined to admit that there were fundamentals which should fetter their freedom. The flexibility thus induced has permitted the remarkable evolution seen in the growth of responsible government, but it adds to the difficulty of stating definitely the precise rules of constitutional law as applied to the United Kingdom.

The fundamental source of the law is the Common Law: on it rest the royal prerogative, the privileges, the judicial and the legislative power of Parliament itself. It has been supplemented and defined by numerous statutes; the franchise, the qualifications of members of Parliament, the mode of election, the judiciary, are thus regulated, as well as the great issues of financial management both as regards revenue and expenditure. The executive authority of the Crown has been repeatedly defined, and defects remedied. Thus the absence of any clear prerogative power to hand over criminals to foreign States has been made good by the enactment of the Extradition Acts, and power to enforce certain duties of neutrality is given by the Foreign Enlistment Act. Where prerogative exists, it may be supplemented by legislation; and it is always a question for interpretation whether legislation dealing with a matter within the prerogative is intended to supersede it or not; there is

no doubt that in time of war some prerogative exists to take possession of land for defence purposes, but, if provision is made by statute which requires compensation, then the prerogative may be merged in the statutory provision.[1] Some statutes, of course, have special constitutional importance, such as the Act of Union between England and Scotland, embodying the terms of the compact between these two independent countries, and the Parliament Act, 1911. Others again declare fundamental principles, such as the Great Charter, 1215, the Petition of Right, 1628, the Bill of Rights, 1689, and the Act of Settlement, 1701. Rules made under statutes and possessing their authority must also be reckoned among the sources of law. Authoritative declarations in the Courts of rules of law, whether based on Common Law or statute, must be added, such as the decision in *Howell's* case[2] asserting the immunity of judges or that in *Bushell's* case[3] according immunity to juries.

Side by side with these rules of law stand the conventions of the constitution, which are principles of its practical working, though not capable of enforcement by the Courts, nor strictly speaking law. Even among the rules of law there are cases where no intervention by the Courts could well be conceived; many duties are incumbent on the Crown in the United Kingdom and the Dominions, which could not be enforced by any order of a Court, such as the issue of writs for elections, though unquestionably legal duties are created by the Acts. But conventions do not possess so high a degree of legal standing. They are merely the principles which have been

[1] *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508; K. & L. p. 325. Cf. above, p. 3, n. 1.

[2] *Hamond* v. *Howell* (1678), 2 Mod. 218.

[3] (1670) 6 St. Tr. 999; K. & L. p. 170.

evolved as the only satisfactory means of keeping Parliament and the executive in effective contact. Thus it is a convention that Parliament must be called at least once a year, and that the ministry shall consist of those members of Parliament who possess a majority in the House of Commons, while, if they lose their support in that house, they must either resign office or obtain a dissolution from the sovereign. It is again a convention that the King shall assent to every Bill duly certified as passed by the two houses. Until the Parliament Act, 1911, hardened the matter into law, it was a convention that the House of Lords should not seek to interfere with the Commons' control of finance. It is a convention that the House of Lords should yield to the decision of the electorate on any issue clearly presented at a recent general election, without forcing the Commons to resort to the formal means now provided in the Parliament Act for overcoming prolonged resistance by the upper chamber.

The sanction for the observation of these and other conventions is primarily, no doubt, public opinion. Political activity is carried on by men who are accustomed to the observance of these conventions, and who would resent seriously any breach. But legal control is also present. It is true that impeachment is obsolete, but defiance of the rules would speedily lead to grave conflict with law. A ministry, which clung to office despite an adverse vote of the Commons, might find itself without the annual Army Act, and therefore unable to control or maintain armed forces; without appropriation measures it could not spend much of the sums which under permanent Acts would continue to be collected, while a large portion of the revenue would cease to be payable. If the King refused to sign a Bill passed by both houses, he might find it impossible to secure a ministry and be faced with a Republi-

can movement, and in any case he could hardly set up his private judgement against the will of the representatives of his people.

In the case of the Dominions and other territories the sources of constitutional law include those above enumerated, but in addition each territory has a fundamental law in the shape of a constitution granted by Parliament or by prerogative Letters Patent, which it may modify indeed as a rule, but only subject to certain conditions. This fact renders all these constitutions in some measure rigid as compared with that of the United Kingdom, but the extent of that rigidity varies greatly from the almost complete exemption from change of the Canadian constitution to the ease of amendment of those of the Irish Free State and Newfoundland.

In addition to these formal sources of constitutional law there should be noted the existence in the United Kingdom, and in less marked degree in the Dominions, of the tendency to demand respect for liberty. There is early evidence of this feeling in Montesquieu's doctrine already mentioned that the aim of the English constitution was to secure liberty, and its existence at the present day is attested by popular resentment of any exercise of police authority which interferes with private rights. Regulations have recently been made which the police authorities have found to hamper their efforts to track criminals. How much less strong the spirit is in the Irish Free State is shown by the success there achieved in establishing a censorship of the press as opposed to British resentment even of the necessary censorship applied in India. Considerations of convenience have failed to induce abandonment of trial by jury or abolition of coroners' inquests. But in the United Kingdom and still more in the Dominions there has to be set against this desire to respect individual

liberty, which was perhaps carried to absurd lengths in the treatment of conscientious objectors in the war of 1914–18, the passion for State regulation in the interests of health and education which accepts on this score drastic limitations of the right of man freely to exploit his own capacities and eagerness for work.

II

THE ORGANS OF THE EXECUTIVE

§ 1. *The King.*

THOUGH, as we have seen, the essential characteristic of the British constitution is the transfer to ministers of the exercise of the powers of the Crown, the King remains an essential and vital feature of the constitution. It is not merely that he actually takes personal part in many of the most important formal acts of state, as in his opening of parliamentary activity by the speech from the throne or his signature of many classes of documents of the highest importance, but his personality supplies an essential link of unity for the British people throughout the Empire. Abstract allegiance to a Crown is clearly an idea unsatisfactory to the average British subject, and there can be no doubt of the great value for the purposes of Imperial unity of the frequent presence of the heir to the throne in the oversea Dominions. Difficult as is the retention under one sovereignty of territories which have attained the sense of national importance now possessed by the Dominions, it is rendered far easier by the existence at the head of the State of a King holding by descent, rather than an elected President, whose selection would raise issues of the utmost difficulty between the several parts of the Empire.

The succession to the throne rests at present on a British Act, the Act of Settlement, 1701, which, in view of the certainty that neither Anne nor William would leave descendants, conferred the throne on the heirs of Sophia Electress of Hanover being Protestants. Descent is governed by the feudal rules of inheritance of land, with the exception that of daughters the eldest inherits. Thus at present

the line of succession to the throne is the Prince of Wales, the Duke of York, Princess Elizabeth, Princess Margaret, the Duke of Gloucester, Prince George, Princess Mary, and her eldest son. No Roman Catholic or person married to a Roman Catholic may hold the throne. The King never dies, so that on the death of the sovereign the new monarch *ipso facto* becomes King, but it is customary for the Privy Council, associated with the Lord Mayor and other representatives of London, to join in his formal proclamation. The King is required to take under the Accession Declaration Act, 1910, a oath to uphold the enactments to secure the Protestant succession, and to declare that he is a Protestant, and under the Act of Union with Scotland he is sworn to uphold the Church of England and the Presbyterian Church of Scotland. The coronation ceremony performed by the Archbishop of Canterbury involves a formal presentation to the people and recognition by them in the presence of the great officers of State, the administration of the coronation oath required by the Act of Settlement, an anointing, coronation, and enthronization.

No power exists in any other Parliament in the Empire to vary the succession to the throne, and the Imperial Conference of 1930, when recognizing the general principle of the unfettered legal power of the Dominions, expressly requires that any change in the succession or royal style should be carried through by concerted action by the United Kingdom and the Dominions. This provision negatives in the view of the Irish Free State the possibility of isolated action, but the Prime Minister of the Union holds that it is not inconsistent with the right of secession.

The royal style by the Royal and Parliamentary Titles Act, 1927, is George V by the Grace of God, of Great

Britain, Ireland,[1] and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

The law does not admit the incapacity of an infant King, but a temporary provision under the Regency Act of 1910 made Queen Mary regent in the event of a child under eighteen becoming sovereign, but without power to assent to a Bill to alter the succession or affect the security of the Presbyterian Church of Scotland. The unhappy lunacy of George III was the occasion for a precedent, a Regency Act being passed, and authority for the issue of a Commission to assent to it being given by resolutions of both houses. The prolonged illness of George V in 1928 led to another precedent. The King signed Letters Patent authorizing the issue of a Commission under the Great Seal creating a Council of State, composed of the Queen, Prince of Wales, Duke of York, Archbishop of Canterbury, and Prime Minister, who were authorized to sign documents and hold meetings of the Privy Council on behalf of the King, but not to create peers, dissolve Parliament, or do any act which they had reason to believe the King might not approve. Exception was taken in the Irish Free State to this creation without Dominion assent, and the royal personages alone signed documents in connexion with the Free State.

The demise of the King originally affected seriously the position of his officers, of legal proceedings, and of Parliament, since the authority given by him was treated as personal, and as perishing with the donor. By successive statutes culminating in the Demise of the Crown Act, 1901, the death of the King has no effect on tenure of office of any kind or on the duration of Parliament; thus a distinction is drawn between the Crown in its official and its

[1] Parliament is the Parliament of the United Kingdom of Great Britain and Northern Ireland. The royal style is geographical.

personal capacity. The same distinction has gradually been achieved as regards the revenues of the Crown. Since the revolution a series of settlements with the King has resulted in the distinction between the public revenues and sums paid to the King for his Privy Purse, household and other purposes, amounting under the Act of 1910 to £470,000 in all, with additional grants for certain members of the royal family, while the Prince of Wales enjoys in addition the revenues of the Duchy of Cornwall. The King personally enjoys the immunity of the Crown from legal process. Neither civilly nor criminally is he liable; any claim against him arising from business transactions must be prosecuted by petition of right, his consent to proceedings is necessary, and no execution can be levied. His person is protected by the law of treason, of which any person is guilty who forms and manifests by act or writing any intention to kill or destroy, wound, maim, or imprison or restrain the King. A measure of protection under the law of treason is also extended to the Queen, the Prince of Wales, and the King's eldest daughter while unmarried. The assent of the King is required for the validity of the marriage of any descendant of George II (save the issue of princesses married into foreign families) under age 25, after which they may marry without consent on a year's notice, unless such action is disapproved by both Houses of Parliament.

The actual part played by the King in administration includes the formal approval by signature of many kinds of documents, presence at the Privy Council meetings where Orders in Council of many kinds are passed, the handing of seals to such ministers as the Lord Chancellor or Secretaries of State on appointment, the delivery of his speech to Parliament, and so forth. For every act of official character ministerial authority is essential; though full powers to

negotiate treaties and instruments of ratification are not countersigned, the royal signature is appended only on the strength of documents duly countersigned authorizing their preparation. The necessity of signature serves one important purpose; it compels the ministry to take the King into its confidence on the matters to which the seal of his approval must thus formally be given. But, apart from that, it is an essential principle that the ministry should keep the sovereign fully informed of its plans of action and its proposals in matters of foreign, Dominion, and colonial affairs, and domestic policy. While the influence of Victoria and Edward VII in the sphere of foreign policy has often been exaggerated abroad, there is no doubt of the keen interest in these matters taken by both sovereigns, and it is certain that the rebuke administered to Lord Palmerston through Lord John Russell, the Prime Minister, in 1851, for failing to take the Queen's view before decisive action, has not since been deserved. The publication of British official correspondence during the pre-war years reveals abundantly the care taken to keep the sovereign fully informed. The right to be consulted, to encourage, to warn, unquestionably appertains absolutely to the sovereign, and long tenure of office and experience of affairs add greatly to the value of the right. Of special importance is the right to endeavour to mediate between extreme views. The Queen proved of valuable service in adjusting the conflict between Lords and Commons over redistribution and extension of the franchise in 1884, and great efforts were made by George V to secure moderation on the vital issues of the Parliament Bill and the Government of Ireland Bill crisis in 1914.

How far does the King have the power of independent action in matters political? In one case the issue is clear; where the Prime Minister of the day resigns, or dies, the

King is free to choose his successor in the sense that he may commission whomever he thinks fit to form a government. In fact, of course, his choice is strictly limited by the possibility of his nominee securing sufficient support in the Commons to form a government which can face Parliament successfully. But undoubtedly there is a margin of selection; Lord Rosebery was appointed in 1894, though Lord Spencer and Sir W. Harcourt had strong claims, and Mr. Baldwin in 1923, when Lord Curzon might equally well have been selected. The retiring Prime Minister has no right to offer a suggestion, though, of course, he may do so if invited.

In other cases the field of independence is strictly limited. If the King disagrees with ministerial policy, and the Cabinet, whose collective advice he is entitled to have, persists in its advice, he can legally dismiss the ministry, as George III rid himself of Fox and North and Grenville in 1783 and 1807, and as William IV was believed to have done with Melbourne, though in fact that minister proffered his resignation. Dismissal was in fact urged on George V in 1913 by opponents of the Government of Ireland Bill. It is, however, clear that the King who forces matters to such a point runs a grave risk, should he fail to secure an alternative ministry or should such a ministry be unable to obtain a parliamentary majority even after a dissolution. The value of the monarchy would be diminished by the discredit of such a failure, and, even if success were attained, the attacks which must be made on the sovereign would weaken popular respect for royalty. Nor is there much difference when the issue is whether the King might refuse a request for a dissolution from a defeated or weak government. He might in such a case find an alternative ministry, but, on the other hand, as the people ought to control the ministry, it would be extremely invidious to

refuse permission to take its verdict. The matter, of course, would be different if after one dissolution a government which had failed to obtain a majority thereat asked for a second. In that case it would be impossible to accede to its request, as that would be to defy the popular verdict and to prevent the functioning of the Parliament which the electorate had returned. The King's grant of a dissolution in 1924 to Mr. MacDonald was accordingly entirely in keeping with the spirit of the constitution. Of course in many cases a ministry must defer to royal objections, for it could not insist on resigning, for instance, because the King objected to confer a peerage on an unworthy recipient or refused to appoint an unfit person to high office. If in any case the King had to refuse advice, and the ministry resigned, the formal responsibility for refusal would be assumed by the incoming ministry, preserving in this way the doctrine of ministerial responsibility, a position frankly accepted by Peel when he thought in 1834 that Melbourne had been dismissed.

Even in the matter of honours, ministerial responsibility is absolute, save that the Royal Victorian Order is personal to the sovereign. But the King takes a special interest in the selection of recipients of high honours as he does in the choice of his representatives in the oversea Dominions and colonies.

§ 2. *The Cabinet.*

The powers of the Crown are wielded under the direction of the Cabinet, which consists of a number of Privy Councillors, members of one or other house of Parliament, charged normally with control of one or other of the great administrative departments, and being leading members of that political party which has a majority in the House of Commons. The essential value of the system is that it

secures the harmony of legislature and executive, and it is, therefore, practically essential that every member should be in possession of a seat or able to secure one in the Lords or the Commons. Exceptions to this practice have become extremely rare of late years. Normally the members must be politically homogeneous, though, when there is division of opinion in the Commons, it may be necessary to have coalition ministries, a practice induced during the war of 1914–18 by various considerations of public interest, but one which proved unsatisfactory, when peace restored political parties to more normal activity. The present existence of three distinct parties has caused the renewal of suggestions of possible coalitions, but without much general acceptance.

Collective responsibility is now an essential feature of the Cabinet. Each minister is, of course, legally and politically responsible for what he orders or does, but the Cabinet is collectively responsible politically for the actions of the government, including ministers who are not included in its number. The idea was of slow growth. Walpole appreciated it, and Rockingham enforced it in his second Cabinet of 1782, but Pitt's Lord Chancellor in 1801 defeated his leader by urging the King to resist the scheme of Catholic emancipation, which, combined with the Union Act, might have reconciled Ireland to Union. Now the Cabinet acts towards the Crown as a unit, and in Parliament it stands or falls as a unit.[1] It is true, of course, that there is some strain in practice in maintaining this rule of solidarity in the Cabinet, but a cabinet which is deficient in real solidarity, as was that of Lord Rosebery, in view of the strained relations between the Prime Minister

[1] If a minister errs, he may resign or be removed on the advice of the Prime Minister, and his policy disavowed, and a minister sometimes sacrifices himself though his policy really was that of the Cabinet.

and Sir William Harcourt, is not likely to have a long life.

The keystone of the Cabinet arch, as Lord Morley calls him, is the Prime Minister, whose selection for office is formally the work of the King, though his choice is necessarily limited by considerations of party standing. It is he who selects for approval by the King his ministry, and on his resignation or death the Cabinet is virtually dissolved, for the ministers merely hold office pending the appointment of a successor, and will not perform other than formal functions. The name was first officially used in the Treaty of Berlin in 1878, and its official adoption has been common in documents only since the grant (1905) of precedence after the Archbishop of York. The office is normally conjoined with that of First Lord of the Treasury, but Lord Salisbury for several years and Mr. MacDonald in 1924 held the seals of the Foreign Office. Walpole first may be said to have enjoyed the true powers of a Prime Minister though he repudiated the name; William Pitt claimed it and in 1803 laid down the necessity of the existence of a First Minister, above rivalry and division of power, and Sir Robert Peel carried to a high degree the art of exercising a full control over every department of State. Growing complexity of business has reduced the possibility of such detailed supervision; Lord Rosebery regarded a Prime Minister as no more than the influential foreman of an executive jury, but much depends on the strength of character of the leader, on the one hand, and the calibre of his colleagues on the other.

With the growing complexity of affairs the size of the Cabinet has developed. Pitt in 1793–1801 was content with a Cabinet of ten members, Lord Salisbury in 1895 had nineteen, Mr. Asquith before the war twenty-one. War conditions rendered such a body unwieldy and a War

Cabinet was substituted from 1917–19, one of its five members alone being charged with administrative office, Mr. Bonar Law being Chancellor of the Exchequer and leader of the Commons. Other innovations were made; hitherto no records had been kept, save in so far as the Prime Minister reported findings to the King; now there were regular agenda, a Secretariat, and formal records of decisions, while outsiders were invited to discussions when this was deemed proper, and Dominion ministers thus were associated with the Imperial government in an enlarged form of the War Cabinet, the Imperial War Cabinet. On the conclusion of peace, however, in 1919, public opinion demanded and received the restoration of a Cabinet of pre-war type of twenty members, though the Secretariat and recording arrangements were duly preserved. It had indeed been proposed by the Machinery of Government Committee of 1917 that the Cabinet should be reduced to ten or twelve members, who were not to hold departmental office, but rather to exercise functions of supervision, but this proposal, generated by temporary circumstances, happily did not take root. Much of the strength of the Cabinet system is derived from the fact that it is made up of the heads of the great departments. Of these the Cabinet of Mr. MacDonald in 1929 included, beside the Prime Minister as First Lord of the Treasury, the Lord Chancellor, the Chancellor of the Exchequer, the Lord President of the Council, the Lord Privy Seal, the Secretaries of State, of whom in 1930 there were eight, the First Lord of the Admiralty, the Ministers of Labour, Agriculture and Fisheries, and Health, the Presidents of the Boards of Education and Trade, and the First Commissioner of Works. It is not customary to include the Attorney-General, but Mr. Baldwin's ministry of 1924–9 gave a place to this officer, despite the presence in the

Cabinet of a higher legal luminary in the person of the Lord Chancellor. With the exception of that officer, no judge by modern practice is admitted to the Cabinet, on the obvious ground that executive and judicial functions are normally irreconcilable.

The business of supervising the whole administration is the essential function of the Cabinet, and it is accustomed to use committees, in which ministers not in the Cabinet may be included, to consider before final decision complex issues. Thus in 1930 when the effort to make the Lord Privy Seal responsible for the vast subject of unemployment proved a failure, a Committee on Unemployment replaced this effort, final responsibility being assumed by the Cabinet. With the appointment of a Secretariat to record and intimate decisions, greater formality of procedure has become possible. In special, efforts by departments to secure Cabinet decisions on policy without sufficient consultation with other departments have been circumvented by the rule (1924) that nothing may be placed on the agenda without due certification that the proper departments have been allowed to discuss the issues, and in special that the Treasury has been enabled to calculate the financial results of any scheme. What matters must come before the Cabinet is, of course, an issue to be determined by common sense. As the government may be destroyed by the error of any minister, no important new departure should be attempted without Cabinet approval, and there is a safeguard against ignoring that body in the rule that the Prime Minister ought to be kept informed by his colleagues of any matters of interest, although it is only in the case of the Foreign Office that he is in regular touch with all questions of any importance. Issues in dispute between departments must be finally disposed of by the Cabinet, which may decide by a majority

even against the wishes of the Prime Minister, as when Mr. Baldwin's settlement of the British war debt to the United States was carried against the desires of Mr. Bonar Law. The Prime Minister, of course, may resign and thus destroy the Cabinet, but such an event is normally rare, for political leaders are accustomed to work together, they have attained office through learning to compromise, and Mr. Gladstone's retirement, in 1894, when his desire to deal with the Lords was frustrated by his colleagues and other measures secured their support, was in part dictated by considerations of age.

§ 3. *The Cabinet and Party Government.*

The Cabinet system essentially rests on party. The existence of bodies of members representing the same point of view has only slowly come to be realized, and it required the extension of the franchise, the improvement of communications, and the development of the press, to render it possible for great party organizations to spring up in the country at large. A political party differs essentially from a body, however numerous, which merely aims at the accomplishment of one reform, as did the Anti-Corn Law League. It aspires to put in power as the Cabinet a group of leaders of its mode of thinking, which will then control the whole life of the State, and carry out a policy in general accord with the views of the party. The tendency to form parties is, of course, an essential feature of human nature, which constantly seeks to express in institutions common feelings, and incentives to party formation have always existed in the obvious contrasts of town and country, employers and employed, landlord and tenant, rich and poor, agriculture and trade, and so forth. It is inevitably by a process of compromise that out of many competing interests and loyalties to group interests the

great political parties have been formed, as a result of realization that only by compromise and union was it possible to secure ends which seemed desirable to each group. Party organization in the United Kingdom is essentially voluntary; the parties are not legally organized as portions of the electoral system. They exist under democratic constitutions of their own, which provide for local bodies, electing representatives to a central body under various conditions, in the case of the Conservatives and Unionists and of the Liberals, while the Labour organization is largely based not on local Labour parties but on the representation of Trade Unions who provide the funds. The object of local associations is to secure in the division a majority of voters for their views, and this is accomplished by dissemination of literature and discussions, while the association has a prime function in determining on the choice of a candidate at the election. The central organization serves to co-ordinate the views of the localities, and it is in its annual discussions that the party policy is most often formulated. Financial aid for candidates and propaganda is secured both centrally and locally. In both the older parties funds were formerly derived largely from contributions of a few rich supporters, often aspirants for peerages, the coalition government of Mr. Lloyd George having won unenviable fame for accumulating funds in this way, but efforts are now made to encourage financial independence on the part of local associations. The imprimatur of the central organization is necessary if aid is to be given from central funds, and if approval of the candidature is to be extended by the party leader. The central organizations, however, do not determine absolutely policy or leadership; the latter is determined by the views of the members of the party in the Commons when the party is in opposition, and by their

acquiescence in the royal commission to form a government, when the party has a majority in the Commons and a government falls to be formed from it. Naturally the recognized leader of the party in the Commons when in opposition has the normal right to expect a royal commission if the party is victorious at the polls, or the government of the day resigns without being defeated at a general election. The views of the political party and its leaders are formed by interaction between the aims of the members of the party in the constituencies and the views of their representatives in Parliament, and beyond all of the Prime Minister or leader of the opposition, as the case may be, for the latter have a closer knowledge of possibilities of action. But the natural tendency of men to seek a leader, and to accept his guidance, frequently results in the party in the constituencies virtually seeking to return a member to Parliament whose essential qualification is his promise faithfully to follow the policy of the leader and the party in the Commons. The leader again must keep in touch with the resolutions of the central body as pointing to the trend of party opinion, but not even the Labour party has yet assigned to such resolutions binding force on the leader in such a degree as to exclude full consideration of parliamentary possibilities.

It is only by the existence of party that the country can be presented with a homogeneous opposition, which continues its existence when the ties of office are dissolved; which can present a steady and reasoned criticism of the administration, legislation, and finance of the government; and be prepared to take office on the failure of the government to meet the needs of the electorate. The coherence of 'His Majesty's Opposition', to use the happy phrase coined by Hobhouse in 1826, is now more definitely marked by the institution of meetings of the 'Shadow

Cabinet', which means a group of ex-ministers, normally those who formed the late Cabinet in so far as they remain in political agreement. It is easy for the government to make arrangements for business with the accredited Whip of the party, who is in touch with its leaders, and the existence of the opposition group of leaders secures the government certainty of support in resisting unwise proposals of private members of their own party or of the opposition, in seeking to discuss delicate issues of foreign or defence matters, to censure judges or civil servants, or to show disregard for the rulings of the Speaker. Moreover, through the existence of an organized opposition it is possible to secure agreement on the composition of Committees appointed by the government or Parliament, and in times of crisis confidential discussions are possible such as are of special value when issues of war and peace are involved. The result, on the whole, is that, while it is the duty of the opposition to oppose, and irritation may often be felt at resistance to measures seemingly for little better than party advantage, there are definite limits of responsibility within which opposition is conducted, and little or nothing is found of the mere opposition to government characteristic of legislative bodies where responsible government is not practised. The critics of the administration have always before their minds the fact that, if they drive the government from power, the country will expect them to be ready to provide an alternative government, and the difficulties of the Labour government in 1929–31 with their own followers are a reminder of the danger of overstepping while in opposition the bounds of reasonable criticism. It is true, of course, that no party can be compelled to take office against its will, as Disraeli pointed out to Gladstone in 1873, when the latter challenged him to do so, since with the aid of some ministerial supporters the Conservatives

had defeated the Irish Education Bill; but the country would clearly have very little patience with a party which under normal circumstances assumed this attitude.

The position of the Cabinet towards Parliament has unquestionably come to assume a more or less dictatorial character. The old rule, that no measure affecting finance can be introduced save on the proposal of a minister of the Crown, has always taken from private initiative a large field of action, but already in 1855 Lord Halifax was able to point out that the practice prevalent in 1828, that legislation was proposed by private members and carried by combined action, had given way to the rule that legislation was as much the function of the government as executive business. Private members are hampered by the power of the government to appropriate the time of the Commons and their invariable practice of leaving to them merely the possibility by success in a ballot to introduce a bill and secure a second reading, after which the Bill may be granted governmental support and facilities for passing, if the proposal happens to please the administration. But, apart from losing initiative, they have lost also the power of free criticism of measures, since the government accepts responsibility for them and insists on their passage. This is, of course, the inevitable outcome of the belief of the electorate that the ministry exists largely for the purpose of passing legislation in the public interests as understood by the party. It would be useless for any government to appeal for a continuation of support merely on the record of administrative success, and, this being so, it must prepare a legislative programme, and pass it through Parliament. It is significant that, when Mr. Balfour, in 1905, felt himself unable to bring forward any such programme, he felt compelled to resign. A private member, therefore, is bound, if he is to justify himself to the electorate, to support

governmental measures, or at least to oppose only in circumstances which do not endanger their passage. That is not to say that private members whether on the governmental side or in opposition do not possess influence, and may not induce the government to modify details of bills; further, as every session many measures must be sacrificed for lack of time, the nature of those thus destroyed is largely dependent on the feeling of the Commons. Those men further, who for some reason of intellect or character appeal to the feeling of the Commons, naturally, before they become members of the Cabinet or government, secure attention for their views and largely affect discussion in committee.

Apart, however, from party loyalty, the Cabinet possesses over its followers, and to some extent even over the opposition, a powerful weapon in the possibility of securing a dissolution of Parliament. Dissolutions since 1829 have eight times only out of twenty-seven been due to the approaching expiry of Parliament, whose term was fixed in 1716 at seven years, reduced to five by the Parliament Act of 1911. Two were under the old rule that the demise of the Crown terminated Parliament, four were occasioned by disputes between the two houses, one was the outcome of the desire of the King for a change of ministry. The remaining twelve were deliberate efforts by the Cabinet to secure from the electorate a more amenable Commons. It is now, as has been seen, the rule that the King will not refuse a dissolution to any ministry which asks for it, subject, of course, to the rule that it has not shortly before obtained a dissolution without strengthening materially its position. A dissolution is always a matter of serious concern to a member of parliament. He is exposed to the risk of losing his seat; he will in any case have the grave trouble and anxiety of a contest; he may have to pay

a considerable portion of the cost of the election. Moreover, if he is interested in some special measure, which he can expect the government to proceed with if there is no dissolution, he is tempted to keep the ministry in power rather than see the failure of his pet hobby. It is not surprising, therefore, that party loyalty, when reinforced by such practical considerations, normally prevents dangerous defections from a government whenever there is a demand for a strict party vote by making the issue one of confidence. Nor is a government usually willing to listen to appeals for freedom of voting on any measure it has brought in. Perhaps it suffers from an exaggerated fear of the loss of prestige accompanying the defeat of a proposal already sponsored by the Cabinet, but it must be remembered that the time for legislation is so limited that the defeat of a measure would often mean that at the close of a session the government might have no legislative accomplishment of importance to appeal to. That the power to dissolve really is of great value may be established by comparison with the rule in France, where dissolution by the government requires the assent of the Senate, and has never been put in operation since the failure of Marshal MacMahon in 1877 thus to facilitate the revival of monarchy. As a result, the Chamber and the Senate alike are far more powerful than is the government, and through committees finance and administration alike are submitted to a degree of effective control without parallel in the British House of Commons.

The appearance of the three-party system has been welcomed in some quarters, as suggesting the recovery of the power of the House of Commons over the Cabinet and the end of an undesirable autocracy in government. When a ministry must attract support from one or other of the opposition parties in order to carry its measures and to

escape censure for administration or finance, it is argued, the value of debate is greatly increased, the importance of personality in the House is enormously enhanced, and the electorate is inspired to attach new importance to the debates of Parliament, which will become a living partner in the work of government, in place of a machine to accept decisions arrived at in the secrecy of the Cabinet, which presents an unbroken front even to the members of the Commons of its own political faith. The objections, on the other hand, to the existence of such a state of affairs as that of 1929–31 is based on the importance of a government possessing driving power and authority to carry out a consistent policy, which is denied when it has no stable majority, and has to secure measures by bargaining with the opposition. Measures, it is argued, result from such bargains which have all the defects of illogical compromises, and, worse still, measures are accepted by the opposition party with which agreement is effected in exchange for other measures, of which the government really disapproves. Thus the country is saddled with Acts for which there is in reality no true parliamentary majority. This consideration explains the bitterness shown both in Conservative and Labour party discussions to the continued existence of the Liberal party, as hampering the effective expression of the will of the majority of the electorate for the time being. The alternative of a coalition ministry has to most politicians small attractions. If such a ministry is to be effective, its followers as a rule have to be bound by the secret accommodations and compromises of the Cabinet, which result, as in the case of the post-war coalition government, in a state of discontent among the supporters of both wings of the coalition ministry.

§ 4. *The Privy Council.*

This venerable body has for all but formal purposes of government given place to the Cabinet, which occasionally is said to form a committee thereof. But technically this is not the case, for the Cabinet is neither by statute nor by appointment a committee of the Privy Council, with which it is connected, on the other hand, through all its members being Privy Councillors. The Privy Council, of course, historically started as a body of the King's chief advisers, but its prestige early led to it being swollen by addition of members, until it ceased to be capable of performing the function of advising, and for that purpose special sections or committees—whose members might include persons not Privy Councillors—were set up. At present its membership includes the chief ministers of the day, and ex-ministers, the Archbishops, the Bishop of London, the Lord Chief Justice, the Lords of Appeal, the Lords Justices of Appeal, Dominion statesmen, ambassadors, and a few others, normally of political or judicial note, to the number of over three hundred. Appointment is by a declaration of the King in Council, and tenure can be terminated only by like action, but the King's sons are Privy Councillors by birth, and do not take the oaths of allegiance and the Privy Councillor's oath of fidelity and secrecy. The Council has a Lord President who is always included in the Cabinet, and admission to the Cabinet is preceded by admission to the Council. The obligation of secrecy as to Council proceedings rests formally on the oath, and, despite grave laxity in its observance, censure was justly bestowed on Mr. Churchill for his quotation in 1930 in the Commons of a Cabinet memorandum on the policy of the United Kingdom at the Washington Conference of 1921–2 on naval disarmament. Privy Councillors are made justices

of the peace for every county, and enjoy the right of presence at the debates of the Lords, a relic of the time when Parliament consisted of a meeting of the King's Council with the barons, clergy, and commons.

The Council as a whole meets only to proclaim a new sovereign, but an enormous number of Orders in Council are passed, as the formal expression of decisions of many kinds, legislative, administrative, and judicial, by the King in actual presence at the Council Board with the aid of a quorum of three Councillors, though a larger number may be, and normally is, summoned. It is not essential that a Cabinet minister should be included, nor, though the Council normally meets on the summons of the Clerk of the Council at the Council Office, is it restricted in place, and Councils may be held in Scotland or wherever the King may be. The Cabinet, on the other hand, meets at the official residence of the Prime Minister, and is summoned by its own secretary, and its members are summoned not as members of the Privy Council, but as His Majesty's servants. At the meetings of the Council as opposed to those of the Cabinet no discussion is possible. The Orders are formally passed because they rest on the authority of a Cabinet minister, and the Lord President of the Council has the duty to satisfy himself that all matters laid before the King in Council duly possess this authority.

§ 5. *The Committee of Imperial Defence.*

A Defence Committee of the Cabinet was formed in 1895 to review issues of Imperial defence from a wider than merely professional aspect, and to co-ordinate the work of the War Office and Admiralty. This was replaced in 1902 by the Committee of Imperial Defence, the creation of Mr. Balfour. Its constitution is extremely elastic. The Prime Minister is the one essential member, but normally its

meetings are attended by the heads of the War and Air Offices and the Admiralty; the chiefs of staff of those departments, who themselves form a technical committee to consider issues of defence and to co-ordinate action; the Secretaries of State for the Dominions and India; and the Chancellor of the Exchequer. This body has the great advantage that, as it is purely advisory and has no powers of control, it can include from time to time ministerial or technical representatives of the Dominions, and it can make use of sub-committees to consider any special issue. Since the war, when its activities were in a measure merged in the work of the War Cabinet, it has been revived, and it serves to meet the arguments of those who urge the creation of a single ministry of defence, with power to co-ordinate the activities of the three defence ministries. The arguments for such a ministry, though strong, have hitherto failed to break down the particularism of the services. A permanent staff created in 1904 serves to preserve the records of the work of the Committee, and to collect the necessary information upon which it can form decisions.

§ 6. *The Departments of State.*

It is usual to apply the term 'minister' primarily to those officers of the Crown who, as members of the government of the day, preside over the departments of State. Of these the great majority are normally, as has been seen, in the Cabinet, but a few remain outside, and of those in the Cabinet several have no departmental charge. Thus the First Lord of the Treasury and the Lord Privy Seal have no substantial work to do as such, while the Lord President of the Council is not overburdened officially by the claims of his office. The minor ministries in the government of

1929 included the Ministry of Transport, the Duchy of Lancaster, the Post Office, the Ministry of Pensions, and that of the Paymaster-General, and the offices of Attorney- and Solicitor-General for England, and of Lord Advocate and Solicitor-General for Scotland. In a wider and less accurate sense the term 'minister' may be extended to cover those officers of State whose tenure is political: the eight Under-Secretaries of State, five Junior Lords of the Treasury, a Civil Lord of the Admiralty, an Assistant Postmaster-General, twelve Financial and Parliamentary Secretaries, and three officers of the royal household.

All these officers stand or fall with the Cabinet, and it is a natural question why it should be necessary thus to make a clean sweep whenever a government changes. Should it not be possible to set aside certain ministries as political and have others whose term of office shall depend on their proving personally acceptable to the Commons, so that they can carry out effectively important policies without necessarily being involved in matters far from their sphere? The answer to this suggestion, often mooted in the Dominions, may be seen in the experience of the Irish Free State, under whose constitution it was intended that distinct from the Cabinet there should be extern ministers whose tenure would be independent of the fortunes of that body. In fact, however, considerations of finance caused the proposal to prove a fiasco. All policy involves financial considerations, and no minister can do anything effective unless he is in close touch with the authority which decides on issues of finance, which under the Irish constitution, as must inevitably be the case, was the Cabinet. The proposal in fact is an illogical effort to combine the advantages of a parliamentary and a non-parliamentary executive, and is bound to fail whenever tried.

The Prime Minister's duties of supervision normally

render his acceptance of departmental work wholly unwise, for it falls to him to lead the House of Commons; dereliction of this duty has recently proved impossible, as only thus can the Prime Minister retain effective control of the feeling of the party and secure the respect of the house. The Lord Chancellor's position is unique, for he acts as chief legal adviser of the government, presides over the House of Lords as Speaker, and often takes charge of governmental measures there, acts as the President of the Lords when sitting as the supreme court of appeal, and presides in the Judicial Committee as the final court of appeal for the Empire outside the United Kingdom. He is charged with duties regarding the care of lunatics, the office of the Public Trustee and Land Registration, and controls appointment to the higher and many of the lower judicial offices, including the appointment, on the advice of Lord Lieutenants, who since 1911 are aided by advisory committees, of justices of the peace. He has the patronage of some 700 benefices in the Church of England, and is custodian of the Great Seal of the Realm. It is not surprising that the Machinery of Government Committee should have suggested that the burden of functions was too great for any one man, and that all administrative duties should be transferred to a Minister of Justice, who in addition would take over from the Home Secretary the task of dealing with police, prisons, and pardons, thus enabling the Lord Chancellor to devote part of his time to the function of a minister for legislation. Of no small importance is the work of the Attorney- and the Solicitor-General, whose essential duty is to advise the departments of the government on legal issues, and to act as prosecutors, and to represent the Crown in proceedings affecting it. The Attorney- or Solicitor-General may stop any criminal proceeding even when instituted by a private citizen by

entering a *nolle prosequi*,[1] and has the right to reply in any criminal case. The fiat of the Attorney-General is necessary in certain legal proceedings, e.g. for the revocation of patents, or the bringing of an appeal from the Court of Criminal Appeal to the House of Lords.

The Treasury represents the old office of Lord High Treasurer, which has been in commission since 1714, a board being appointed by letters patent under the great seal on the formation of a new ministry. Its members are the First Lord, the Chancellor of the Exchequer, and at present five Junior Lords, whose chief business is to act as governmental whips in Parliament, 'to make a house, to keep a house, and to cheer the minister', as Canning put it. It is the essential function of the Treasury to control finance, and the code of regulations which it lays down can be disregarded only with its consent, or by authority of the Cabinet overruling it. On its vigilance depends such measure of economy as may be effected in public finance, but the tendency of present ministries to spend largely on matters of public interest has greatly reduced the effectiveness of the Treasury as a check on spending. On the other hand, as Parliament is ineffective in this regard, the Treasury control has considerable value, but it breaks down hopelessly before any politically attractive scheme. The Treasury controls the civil service establishments and rates of pay, &c., but the introduction of the system of Whitley Councils into the service, and the large increases in salaries granted to the Civil Service, have rendered it difficult for the Treasury any longer to exercise that rigid economy, which in pre-war days saved the country large sums.

The office of Principal Secretary of State is of more modern date, but the title was used at the close of Eliza-

[1] *Reg.* v. *Allen* (1862), 1 B. & S. 850; K. & L. p. 274.

beth's reign of Sir Robert Cecil, and with the emergence of the Cabinet the Secretaries of State, usually two, became important officers, becoming ultimately the Secretaries of State for Home Affairs and Foreign Affairs. A Secretaryship of State for War dates from 1794, taking over in 1801 control of colonial affairs, but a distinct Secretary of State for the Colonies appeared in 1854, and a Secretary of State for the Dominions in 1925, though until Mr. Thomas's appointment in 1930, the two offices were still held by one minister. The Secretaryship of State for Air was established in 1917, and Scotland was given once more a Secretary of State in 1926, taking over functions since 1885 exercised by a Secretary for Scotland, and earlier by the Home Secretary and other offices.[1] India, when taken under the direct management of the Crown in 1858, was given a Secretary of State aided by a Council, mainly composed of ex-governmental servants of Indian experience. An Army Council was created in 1904, and similarly the Secretary of State for Air is advised by an Air Council. Many powers are expressly assigned to the Secretary of State in Council in these three cases, but as regards Air and War the Secretary of State is in control of his Council, and may override it, if he so pleases, while the Secretary of State for India is limited in matters affecting the expenditure of Indian revenues and the civil service. Normally all the Secretaries of State can exercise the functions of any of the rest, which is convenient in the event of the absence of any of them. The Home Secretary's duties are varied and miscellaneous, including factories, prisons, pardons, police, extradition, aliens, and generally unallocated subjects.

The Admiralty is representative of the office of Lord High

[1] Only six Secretaries of State may sit in the Commons. For Under Secretaries see 20 Geo. V, c. 9.

Admiral, last held in 1827, and is appointed as a Board by letters patent like the Treasury. It consists of a First Lord, who is in the Cabinet, the Civil Lord, a political officer, and four Sea Lords, and has a Parliamentary and a Permanent Secretary. In this case again the final decision rests with the First Lord, subject, however, to the duty which the Sea Lords have to insist on the maintenance of a naval force sufficient to secure the country from danger in war, and in practice the Cabinet alone, and that very reluctantly, will override the views of these Lords. But the probability of opposition may be diminished by the selection as Sea Lords of men likely to accept the policy desired by the government of the day.

The Boards of Education and Trade are Boards in name only, for the functions are exercised in either case by the President, while the Board of Works is really the First Commissioner. Both make use of advisory committees, but these are not statutory bodies of the status of the Army Council. The Local Government Board was in 1919 transformed into the Ministry of Health, and the Board of Agriculture and Fisheries was at the same time converted into a Ministry. The Ministries of Labour and Pensions date from 1916, that of Transport from 1919, while the Postmaster-General goes back to 1710. The Chancellor of the Duchy of Lancaster has a few functions to perform in respect of the ancient Duchy including the appointment of County Court Judges, but this office, like that of the Lord Privy Seal, or of the Paymaster-General, is used to provide for a minister free to devote his time to other work.

§ 7. *The Permanent Civil Service.*

The growth of the modern State necessarily enormously increases the numbers of subordinate officers who must be employed to carry out the constantly increasing mass of

work, and ministers can do no more than supervise the most important of the transactions of the departments, leaving it to their subordinates to carry out detailed administration. Prior to 1870 the civil service suffered, not from insecurity of tenure, for there was no readiness to terminate the engagement of holders of offices, but from patronage, a relic of which is seen in the title Patronage Secretary given to the Parliamentary Secretary to the Treasury. Since then recruitment for the civil services is largely entrusted to non-political officers, the Civil Service Commissioners, who use competitive examinations as the normal mode of entrance to the service, though exceptions are made in many cases of technical employments. They do not control promotions nor conditions of service, the latter being the business of the Treasury in consultation with the departments, while promotions depend primarily on the political head of each department and his advisers. Since the war large increases of salary have been accorded, and the principle of Whitley Councils for determining conditions of employment has been in considerable measure introduced, disputes between the two bodies, representing the interests of the State and the employees especially, being decided by arbitral awards of the Industrial Court.

The legal tenure of the civil servant is essentially at the pleasure of the Crown, and no minister has any authority to give any other form of tenure without statutory sanction, as has been decided in a number of cases referring both to service at home and abroad.[1] Nor has the civil servant any legal right to claim a pension,[2] though that in fact is accorded and is a valuable consideration for his services. Even his salary can be claimed, if withheld, only through

[1] *Dunn* v. *R.*, [1896] 1 Q.B. 116; K. & L. p. 241; *Shenton* v. *Smith*, [1895] A.C. 229.

[2] *In re Irish Civil Servants* (1929), 98 L.J.P.C. 39.

the procedure of Petition of Right, which involves the assent of the Crown to the action being brought. But these legal disabilities are unimportant in comparison with the practice which refuses to remove a civil servant, once confirmed after a probationary period of six months or more, save for gross misconduct. There is no doubt that a degree of inefficiency which would be disastrous to a man in commercial employment may be overlooked under civil service conditions. The civil servant is entitled and bound to serve impartially and to the best of his ability every administration, whatever its political views. In doing so he acquires no discredit, however much he dislikes its actions, for the whole responsibility rests with the minister, however little he may actually have approved any erroneous act. It is, therefore, not permitted to criticize individual civil servants in Parliament, and the minister must accept responsibility for their errors. A classical example of propriety of action was seen in 1917 when the Secretary of State for India retired from office because of his technical responsibility for the disgraceful mismanagement of hospital arrangements on the Mesopotamian expedition, for which Sir A. Chamberlain had no real responsibility whatever.

A most salutary rule permits a civil servant to exercise the franchise, but denies him the right to appear publicly as a political partisan. He is not merely ineligible while a civil servant for sitting in the House of Commons, but is required by Treasury regulations to resign office when he decides to stand for Parliament, nor is it yet customary to nullify this rule by permitting the re-employment of a civil servant who has thus resigned. The present system has the great advantage that it secures for the civil servant the prospect of an honourable career free from risk of loss of office through political change.[1]

[1] Civil servants may not, under the Trade Disputes and Trade Unions

Though nominally the control of policy appertains to the minister, it is obvious that in many cases the suggestions which are adopted as the policy of the government really emanate from civil servants. But how far this is the case is a matter depending on innumerable circumstances, and the present system of co-operation between the changing ministries and the permanent servants seems best adapted to meet the needs of stability and of progress to satisfy emergent public demands. The claims sometimes made for greater self-determination on the part of civil servants, in the sense that the minister should indicate objects and the civil service should fulfil these in autonomy, is probably more theoretically than practically defensible.

Act, 1927, be members of unions affiliated to unions of persons not in the employment of the Crown. For their liability in tort for any act contrary to law see ch. iii, § 1.

III

EXECUTIVE FUNCTIONS AND THEIR CONTROL BY THE LEGISLATURE AND JUDICIARY

§ 1. *Civil Administration.*

EXECUTIVE authority in the United Kingdom is not and never has been solely vested in the Crown or its agents, and a great portion of the actual government is not carried out either by ministers nor by those subordinate to their directions. Thus the justices of the peace, who formerly were virtually the instruments of local government and even now perform certain of their old functions of an administrative type, though appointed by and removable by the Crown, are not subject to orders, but exercise their power under statutes and subject only to such directions as may thereby be laid down. The borough and county councils with lesser bodies which now control local government have statutory powers, and are subject in certain matters to the orders of the departments of the central government, especially the Ministry of Health; again they are controlled by the Home Office in regard to police administration, but only in the main because of the fact that the power to make grants up to half the expenditure on police is vested in the central government, and its grants are conditional on the local force being certified by the Home Office Inspector General as up to the necessary standard of efficiency. Many other functions which would naturally be regarded as governmental are entrusted to boards or commissions which have no connexion with the government, save in some cases through the fact that Treasury grants are given in return for conformity with certain principles. The Universities are

autonomous, but through the University Grants Committee, which advises the government as to the mode in which to allocate the funds voted by Parliament for university purposes, certain lines of action can be indicated. So, too, the Treasury regulates the conditions of service in such bodies as the British Museum. Moreover, of late, the plan of setting up public utility commissions with funds voted by Parliament, but not under ministerial control, has been widely favoured as securing the advantages of private management freed from political interference. Such bodies include the Forestry Commission, the British Broadcasting Commission, the Imperial War Graves Commission, the Central Electricity Board, &c., and there exist many other statutory authorities such as the Port of London Authority, while Trinity House with its control of lighthouses is a good example of an ancient chartered corporation which performs a national duty. Such companies played once a great part in colonial and Indian expansion, for they were granted some delegation of sovereign authority, while remaining quite independent of the control of the Crown save in so far as special provision was made in the charter or, as in India, by subsequent legislation. The armed forces of the Company were thus not servants of the Crown, and special arrangements had to be made by statute to secure their re-enlistment on the transfer of the government of India to the Crown. On the other hand, many bodies despite apparent independence are no more than subordinate offices to the Treasury, as are the Boards of Inland Revenue and Customs, the Civil Service Commission, or the Charity Commission.

The distinction between the cases is important, for it is only as directly acting for the Crown that government departments enjoy the privileges which appertain to the

Crown, and which form part of its prerogative. In the domain of civil government in the United Kingdom the prerogative at the present day is comparatively limited in extent, for the field in which it might operate has been largely invaded by statute, and, though it is true that the Crown is not bound normally by a statute which *prima facie* is made for subjects, that does not apply to legislation which to have its effect must be deemed to bind the Crown. Moreover, it is the tendency of the law courts to hold that, where provision is made by statute covering the ground which might be occupied by prerogative, it may be fairly deemed that it is the intention of Parliament that the prerogative power shall be deemed to have been replaced by the statutory, so that action must be subject to the conditions laid down by the law.[1] Further, many of the functions of civil government are of modern development, and had to be provided for by statute, in the absence of any precedent of prerogative authority. Education, for instance; could not be made compulsory without the aid of Parliament, which too had to provide funds and in doing so to lay down conditions for their expenditure, and the whole wide field of public health has required regulation by statute. It is in fact naturally in the sphere of the simple duty of preserving law and order that the prerogative necessarily came into being in early times, and traces of it still remain apart from statutory authority.

The officers of the Crown are, apart from statute, specially charged with the duty which is indeed incumbent on private citizens of suppressing riot and disorder, and they are entitled to demand the aid of any private persons in accomplishing that end; a police constable may call on aid to suppress a prize fight,[2] and a Mayor, who fails to do

[1] See p. 29, above.

[2] *Reg.* v. *Brown* (1841), C. and Mar. 314; K. & L. p. 364.

his best to put down rioting,[1] may have to stand his trial for failure to act with firmness, while an officer of the military forces may be courtmartialed. But the necessity of more effective provisions to meet modern conditions is recognized in the Emergency Powers Act, 1920, which, in the event of action taken or threatened to deprive the community of essentials of life, empowers the King to declare a state of emergency by proclamation, which is in force for a month but may be renewed. Such a proclamation must be at once laid before Parliament which if not in session must be summoned. It is then possible by Order in Council to make regulations for the public safety, subject to approval within seven days by resolutions of both houses, nor may any system of military service or industrial conscription be enacted in this way, nor the right to strike or peacefully persuade others so to act be taken away. The powers so carefully safeguarded were used in the General Strike of 1926, and in 1927 an effort was made by amending the Trade Union Acts to prevent general strikes by removing all doubt as to their illegality which had been asserted by one judge.[2] In 1931 the question was reopened.

The prosecution of offenders against the law is a right which appertains in England, as opposed to Scotland, to private persons no less than to the Crown, but gradually the Crown has more and more accepted the obligation, rendered easy of accomplishment by the creation of a special department under the Treasury, of undertaking prosecutions in the interests of justice. As already mentioned, on the same ground it can stop any criminal proceedings by entering a *nolle prosequi*. It possesses also the power of pardon of offenders against the criminal law before or after conviction, save only that no pardon can be

[1] *Rex* v. *Pinney* (1832), 3 B. & Ad. 947; K. & L. p. 363.

[2] *National Seamen's and Firemen's Union* v. *Reed*, [1926] Ch. 536.

pleaded under the Act of Settlement, 1701, in bar of an impeachment, and offenders against the Habeas Corpus Act, 1679 (s. 12), are incapable of receiving pardon. The power, however, applies in no way to destroying rights of private persons to recover damages or informers to obtain penalties, to remit which legislation was secured in 1859. Nor can an offender who is imprisoned by order of a Court, not as a punishment for contempt, but in order to compel obedience to an order of the Court, be pardoned, since this would defeat the purpose of the law. The duty of dealing with pardons is given to the Home Secretary, though under the Criminal Appeal Act, 1907, he may obtain the opinion of the Court of Criminal Appeal. Reasons for his action, which is always based on the fullest consideration of facts and on consultation with the judge by whom the case was tried, are not normally given, though in a recent case in 1930 a brief assurance was given to the public that a reprieve could not properly be given to a condemned murderer, as he was satisfied that the crime had actually been committed by the accused.

The Crown possesses also, as already mentioned, a general power to appoint its servants, but this is largely regulated by statute. The power to dismiss remains unimpaired, and is a prerogative which can be taken away only by law. This ruling is only one aspect of a more general principle that the Crown cannot contract itself out of its sovereign rights, as was laid down in a case[1] where neutral shipowners had obtained a promise from the government that, if a certain ship were sent to England, it would be granted a clearance, and the clearance was in fact refused, when asked for, as the government in the circumstances deemed this course better.

The Crown further is exempt from legal process at the

[1] *Rederiaktiebolaget Amphitrite* v. *R.*, [1921] 3 K.B. 500; K. & L. p. 242.

instance of the subject save in so far as it consents to action being taken, and it can consent only in matters arising out of lawful acts by its servants as opposed to tortious acts. Proceedings against the Crown are now governed by the Petition of Right Act, 1860, under which before any claim can be pursued in the Courts the fiat of the King must be obtained. This is normally granted on the advice of the Attorney-General, where there is any scintilla of a just claim, but it is not granted of course, nor for frivolous demands. But the right is restricted to claims for the recovery of property and claims in contract and matters analogous, as opposed to tort. In the latter case the maxim that the King can do no wrong applies, and the remedy lies against the officer who was guilty of the wrong done, or who ordered its commission, or adopted as his own the wrongful act. Thus Lord Canterbury could recover no compensation for the loss of his property when the Houses of Parliament were destroyed by fire in 1834, through negligence of servants of the Commissioners of Woods and Forests,[1] nor is the Postmaster-General liable for the negligence of one of his servants in laying out an electric wire.[2] That this is entirely just is not generally agreed, and legislation to take from the Crown its special privileges in these matters has been favourably regarded by successive Lord Chancellors. As the Crown can be held liable in contract under the procedure by Petition of Right, it is impossible to hold its officers responsible in contract, as they act not for themselves but the Crown.[3]

[1] *Canterbury* v. *Attorney General* (1842), 1 Ph. 306; K. & L. p. 244; *Tobin* v. *The Queen* (1864), 16 C.B. (N.S.) 310. Cf. Keith, *Journ. Comp. Leg.* 1928, pp. 186–95.

[2] *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178; K. & L. p. 252; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; K. & L. p. 250; *MacKenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517.

[3] *Macbeath* v. *Haldimand* (1786), 1 T.R. 172; K. & L. p. 260. See *Gidley* v.

The royal prerogative to preferential treatment in the case of bankruptcy has been strictly limited by the Bankruptcy Act, 1914, and recently it has been ruled that by necessary implication the same principle applies in the winding up of companies.[1] A like doctrine has been ruled to give to Crown tenants the relief against the necessity of complying in war with certain covenants which was granted in general terms by statute.[2] The prerogative as to coinage in the same way may be deemed to be merged in the statutory powers given by the Coinage Acts. That as to honours remains unlimited by statute, but trafficking in honours is penalized by the Honours (Prevention of Abuses) Act, 1925.[3] In respect of residents in the Dominions the prerogative is exercised only with the assent of the Dominion governments, and Canada, the Irish Free State, and South Africa now refuse such assent.

§ 2. *Defence.*

For purposes of the defence of the realm the royal prerogative is wholly inadequate, and has been regarded with grave suspicion by Parliament, which has realized the necessity of imposing a strict control on the armed forces of the Crown. Whether the Petition of Right in 1628 was or was not meant to take away the prerogative right to govern armed forces in time of war by the law administered by the Constable and Marshal, may be disputed, but now it is certain that the power essentially rests on the annual enactment of the Army Act, and the position of the Air Force is precisely the same. It is by this means that the Crown is authorized to maintain forces of specified maxi-

Lord Palmerston (1822), 3 Brod. and B. 275; K. & L. p. 262; *Thomas* v. *The Queen* (1874), L.R. 10 Q.B. 31.

[1] *Food Controller* v. *Cork*, [1923] A.C. 647.

[2] *Attorney-General of Duchy of Lancaster* v. *Moresby*, [1919] W.N. 69.

[3] Cf. *Parkinson* v. *College of Ambulance*, [1925] 2 K.B. 1.

mum strength, and to govern them according to rules which are enforced by special military courts.

The position of a sailor is analogous to that of a soldier, though the navy has never aroused the suspicion of Parliament in the same way as the army. Thus, while the Long Parliament was emphatic in forbidding impressment for the army, it left the system of pressing seamen for the navy strictly alone, though now the power thus to act is not included in the commission of the Board of Admiralty, and the practice to rely on the prerogative is obsolete. Compulsory service for either force now needs special legislation, which was duly passed in 1916 and reinforced in the following years. The question of discipline in the navy is not provided for in an annual but in a permanent Act.

The essential feature of the position of any member of the defence forces is that he does not divest himself by entering into the service, normally by voluntary enlistment, of his status and rights under the ordinary law. Virtually he adds fresh obligations due to his new status, much as a clergyman of the Church of England has, in addition to the ordinary obligations of a British subject, special liabilities of his own. These fresh obligations are normally matters for the military, as opposed to the civil, courts, which in itself is not unreasonable, for the issues which have to be dealt with require expert knowledge and handling. But the question whether a man is subject to military law at all may arise, and often did arise under the war-time legislation for compulsory service, and this is an issue which a civil court must decide. Nor will civil courts leave military courts wholly unchecked in their action. They will not, it is clear, deal with any claims in respect of right to pay or promotion which are claimed as due under military regulations. Nor, apparently, will they interfere with any action causing injury to person or liberty done

within the limits of military jurisdiction,[1] even if there is an absence of reasonable and proper cause, amounting to an abuse of process. But they will interfere, and an action for damages will lie, in respect of any injury inflicted by a military officer on any person where there existed no right of jurisdiction, even if the injury purports to be in execution of military discipline.[2] It must not, of course, be thought that there is no remedy for wrongful action by officers under military powers; that may be punished by military courts and wrongs may be redressed by the Crown under the military code. Whether, even so, the exemption of courts martial from control is not carried too far has been doubted.

A difficult problem is presented by the conflict between the common law duties of a member of the defence forces and his duty to obey orders given to him by his superior. It seems, however, that the Courts will make allowances for the difficulty of the position of the soldier, and that, if he honestly believes that he is obeying a superior's orders, and if the orders are not *per se* patently illegal, he will not be held criminally liable for obeying them,[3] though, of course, his superior will be so liable. It is not clear whether the same rule would apply to civil liability. In the case of an officer it may be assumed that a much less degree of patent illegality would suffice to deprive him of the defence of obedience to superior orders.

As in the case of a civil servant no member of the armed forces can claim immunity from discharge by the Crown at pleasure, and no action will lie in respect of such discharge.

[1] *Dawkins* v. *Lord Paulet* (1869), L.R. 5 Q.B. 94; K. & L. p. 341; *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255. For the navy see *Sutton* v. *Johnstone* (1786), 1 T.R. 544.

[2] *Heddon* v. *Evans* (1919), 35 T.L.R. 642; K. & L. p. 340.

[3] *Reg.* v. *Smith* (1900), 17 Cape Supreme Court Rep. 561; K. & L. p. 348; *Keighly* v. *Bell* (1866), 4 F. & F. 763.

Though soldiers and airmen are solely liable to special courts for military offences, they may be tried in these also for civil offences, except treason and murder. Acquittal or conviction does not bar a civil prosecution, but any punishment awarded by a military court must be taken into account in the civil court when passing sentence. On the other hand, if trial has taken place in a civil court, there can be no further proceedings in a military court.

§ 3. *Martial Law and Emergency Legislation in War-time.*

It is clear from the Petition of Right that martial law cannot be exercised against civilians in time of peace, even if its use in time of war is left an open question, and, as since that date no effort has been made to exercise it in England, the power of the Crown has only come under discussion in respect of its exercise in the colonies[1] and in Ireland. What is clear, of course, is that the common law right and duty of citizens to deal with riots extends in a much higher degree to combating insurrection in war. But the difficulty which arises is to what extent it is open to the Courts to take cognizance of acts done by the executive against civilians in British territory who are suspected of acting injuriously to the national interests in war, or whose rights are in any way interfered with on the score of military necessity. *Prima facie* the Courts should deal with all such cases of apparent infringement of right not specifically authorized by law, but, on the other hand, such action might paralyse measures necessary to prevent aid being given to the enemy or the suppression of insurrection. It has, accordingly, been ruled in the South

[1] In *Reg.* v. *Nelson and Brand* (1867), Cockburn, C.J., and in *Reg.* v. *Eyre* (1868), Blackburn J. delivered addresses to Grand Juries on prosecutions for actions done in Jamaica, but the Juries threw out the bills, and civil action was held to be barred by an Indemnity Act; *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; K. & L. p. 426.

African case of *Ex parte Marais*[1] that the Courts should not interfere with military acts when they are satisfied that a state of war exists, overruling the earlier view that power of jurisdiction existed save when the Courts had to be suspended on military grounds. This doctrine, which applied to action during a formal war, was extended to the case of a serious insurrection in *Tilonko's* case[2] in Natal, and on the whole it is supported by a series of Irish cases, of which one was carried to the House of Lords.[3] But it has been emphatically held in Ireland that it is for the Court itself to decide whether or not there is a state of war, and no mere assertion of the military authorities is sufficient to establish that war exists.[4] Moreover, it appears clear that, when the state of war is over, it is open to the Courts to entertain actions for damages in respect of wrongful acts committed during the war against civilians. Even an Indemnity Act was held not to bar damages being given in Ireland for a misuse of powers of martial law,[5] and this appears still to be the view of these Courts. In fact, of course, it is normal to indemnify all acts done in war or rebellion by Act of Parliament, so long as the acts impugned are done in good faith, and this procedure seems necessary, though it should be accompanied by compensation in cases where men have suffered unfairly through errors of the military authorities. The Courts, of course, may freely operate if there are no military objections, and any rash action such as the shooting of innocent persons

[1] [1902] A.C. 109; K. & L. p. 383.

[2] *Tilonko* v. *Attorney-General of Natal*, [1907] A.C. 93.

[3] *Rex* v. *Allen*, [1921] 2 I.R. 241; K. & L. p. 389; *Clifford and O'Sullivan, In re* [1921] 2 A.C. 570; K. & L. p. 398.

[4] *Rex* (*Garde*) v. *Strickland*, [1921] 2 I.R. at p. 329; K. & L. p. 373; *R.* (*O'Brien*) v. *Minister of Defence*, [1924] 1 I.R. 32.

[5] *Wright* v. *Fitzgerald* (1798), 27 St. Tr. 765; *Rex* (*Ronayne*) v. *Strickland*, [1921] 2 I.R. 333; *Higgins* v. *Willis*, [1921] 2 I.R. 386.

during the putting down of insurrection may be murder and punished accordingly.[1]

The tribunals which are set up by military authorities to deal with offences committed by civilians during war, whether called courts martial or not, are not law courts of any kind in the eyes of the law, and therefore no appeal lies from them, nor can their proceedings be made the subject of prohibition by the civil courts.[2]

The defects of the prerogative were remedied very satisfactorily, and recourse to martial law rendered needless during the war, by the making of regulations under the Defence of the Realm Act, 1914, which enabled the executive to exercise all necessary restraint and interference with common law rights without closing the Courts. It is significant that the exercise of this right was closely scrutinized, and in *Zadig's* case[3] it was endeavoured to convince the Court that a regulation authorizing the imprisonment of a person of hostile origin or associations from motives of caution was not within the powers given by the Act. But the Court laid it down that the regulation was valid, the statute under which it was made and the regulation simply altering the law and depriving the internee of the right to *habeas corpus*. On the other hand, the Courts are ready to vindicate liberty as in the case of *Art O'Brien*,[4] where certain persons had been arrested and deported to Ireland in aid of the efforts of the Irish Free State government to suppress the civil war then there raging. The action taken was believed to be valid under a regulation made under the Restoration of Order in Ireland Act, 1920, but the Court of Appeal held that the

[1] Cf. *Sheehy-Skeffington's Case* (1916), Parl. Paper, Cd. 8376.
[2] *Clifford and O'Sullivan*, u.s.
[3] *Rex* v. *Halliday, Ex parte Zadig*, [1917] A.C. 260; K. & L. p. 13.
[4] *Rex* v. *Secretary of State for Home Affairs, Ex parte O'Brien*, [1923] 2 K.B. 361.

regulation had ceased to be in force after the operation of the Irish Free State Constitution Act, 1922, and that accordingly the seizure and deportation were invalid. The government accordingly procured an act of indemnity providing for just compensation to those wronged.

As against an alien enemy, who forms part of a hostile force on British soil, the doctrine of Act of State applies, and it is in the power of the executive to use any degree of force permitted in warfare to deal with him. It is clear also that the executive has the right under the prerogative to intern as a prisoner of war any alien enemy, even if he is lawfully and peacefully present on the territory, simply because by the outbreak of war he becomes such an enemy, and in such a case *habeas corpus* will be refused.[1] But the doctrine will not be extended to cover the case of the seizure and detention of property found in the possession of an alien, whose country is not at war with the Crown, simply because he personally is engaged in acts of treason on British territory, at any rate unless the Crown has made it antecedently known that the protection which is due to every person, irrespective of nationality, on such territory by reason of their presence there, is to be withdrawn.[2]

The term 'Martial Law' is also, most confusingly, applied to the acts of British commanders in occupation of foreign territory during war time. In such cases the powers of the commander are in no wise controlled by British courts. They are laid down by the Army Council on the base of what is permitted by international law, and no action will lie in a British court in respect of any such

[1] *Rex* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann*, [1916] 1 K.B. 268.

[2] *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262; K. & L. p. 312. The use of the term 'prerogative' in such cases has been doubted, but without adequate ground; Keith, *Responsible Government* (1928), i. 69 n. 3; *Engelke* v. *Musmann*, [1928] A.C. 433, 451, 457 f.; Holdsworth, *Law Quarterly Review*, xlv. 165 f.

action abroad. Nor do British courts interfere with the treatment of prisoners of war interned in British territory, except to any extent to which authority may be given by licence from the Crown for such prisoners to acquire contractual rights.[1]

§ 4. *Foreign Affairs.*

It is in the realm of foreign affairs including both peaceful and hostile relations with foreign States and their subjects that the Crown has still the widest prerogative powers. There is no doubt whatever of the absolute discretion of the Crown as to entering into and maintaining diplomatic relations with any power, including the right to recognize a newly constituted State, such as Poland, or a revolutionary government, as in the case of the recognition of the Bolshevist government in Russia by the Labour government in 1924. It can make any treaties which it likes to make. It can declare war and make peace on any terms it thinks fit. In war it can make such orders as it pleases regarding blockade, days of grace, trading with the enemy, contraband and all kindred matters, subject to the rule that it must not contravene international law. Under the modern constitutional system, of course, these acts will necessarily be those of a ministry which commands the confidence of the country; but the fact remains that it is only very recently that the practice has become normal of submitting for formal approval by Parliament or the Commons such matters as the rupture of relations with the Russian government in 1927 and the renewal of diplomatic relations in 1929. Even now it is not the practice to insist, as was proposed by the Labour government in 1924, on submitting all treaties for parliamentary approval. When a protocol of a provisional character

[1] Dicey and Keith, *Conflict of Laws* (1927), p. 858.

was concluded with Russia in 1929, the government insisted on regarding the approval of the House of Commons as sufficient ground for ratification, although the instrument itself, *per incuriam* apparently, contemplated approval by Parliament which normally means both Houses, and similarly the British acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice was not submitted to the House of Lords.

Internationally, it is clear, any treaty duly ratified by the King binds the Crown, and similarly a declaration of war by the King places all British subjects and territories under a state of war. But there is a limitation on the practical exercise of the treaty power in that it is not open to the Crown by any treaty to alter the law of the land, or at least it is extremely doubtful whether the law can thus be altered.[1] Moreover, although in strict law it seems that the Crown could cede territory without parliamentary approval, since the cession of Heligoland was approved by Parliament in 1890 it has been the rule that every cession of British territory requires parliamentary sanction. Such sanction is needed also for every change in the law affecting private rights, the alteration of the laws of trade or navigation, or granting public moneys. Hence it was essential that the several treaties of peace which concluded the war of 1914–18 should be given effect by Acts of Parliament, for they involved the disposal of a great mass of private claims against former enemy subjects for whose treatment special tribunals of arbitration were to be erected. Incidentally the Imperial Act of 1919 has served to validate the Commonwealth government's control of the former German New Guinea. The disarmament treaties of Washington, 1922, and London, 1930, have similarly

[1] *Walker* v. *Baird*, [1892] A.C. 491; K. & L. p. 310.
[2] *Damodhar Gordhan* v. *Deoram Kanji* (1876), 1 App. Cas. 332.

demanded legislation to restrict any construction of war vessels contrary to their terms.

International relations still offer a field in which the doctrine of Act of State excluding the intervention of the Courts can be applied. It is settled law that the British Courts will not compel the British government after the annexation of territory to recognize obligations which appertained to the previous sovereign. Otherwise, it has been argued, the Crown might have to undertake a crushing liability for armaments ordered by the late sovereign for the purpose of waging war against the British government.[1] The same doctrine has been applied to cases of the overthrow of Indian and African princes, and, though apparently harsh, it seems inevitable. The doctrine extends further to the extent that any act committed by order of or ratified by the British Crown against a foreigner outside British territory is not justiciable in British courts, as when a naval officer committed a trespass against a Spanish subject in West Africa to release two slaves.[2] Whether the doctrine can be applied to an alien on British territory even if he plans treason against the Crown has not, as we have seen, been finally decided.[3]

Rules of international law are not normally enforceable in British courts, but there are exceptions. The power of the Crown to determine the law to be observed by Prize Courts was examined critically in *The Zamora*,[4] and it was

[1] *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K.B. 391; *Cook* v. *Sprigg*, [1899] A.C. 572; Keith, *State Succession*, pp. 14, 15. So also the Courts will not interfere in the disposal by the Crown of German war reparation payments; *Civilian War Claimants' Association* v. *The King* (1930), 47 T.L.R. 102.

[2] *Buron* v. *Denman* (1848), 2 Ex. 167; K. & L. p. 295; *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P.C. 22.

[3] *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262; K. & L. p. 312.

[4] [1916] 2 A.C. 77; K. & L. p. 66.

decided, rather unexpectedly, that the Crown is bound by international law, as interpreted by the Privy Council, and is not free to act on its own views of international law. This decision gives the Prize Courts, which the King by the prerogative establishes during war, a completely different aspect from mere tribunals set up to exercise, according to the discretion of the Crown, rules of law enacted by it. The Crown, it was held, may vary international law in the sense that it may waive rights under it, but it may not enforce rights contrary to the view of international law held to be sound by the Court. This is, of course, contrary to the normal continental views of the functions of Prize Courts, and overruled previous dicta even of so great a lawyer as Lord Stowell.

The Courts also give full effect to the international law doctrine of the immunity of diplomatic agents and sovereigns from legal process. This immunity, it must be added, is strengthened, though not enacted as new law, by an Act passed in 1708 to mitigate the just wrath of the Czar of Russia at the arrest for debt of his envoy, an action which he held should be punished by the execution of the wrongdoers. It has been decided by the House of Lords that it is the duty of the Courts to accept without question the decision of the Foreign Secretary on the question whether any person is or is not entitled to diplomatic privilege and that judicial inquiry is excluded.[1] The same doctrine applies to the question whether any person is to be deemed to be a sovereign so as to escape jurisdiction, a rule applied to the Sultans of Kelantan and Johore and to the Gaekwar of Baroda.[2]

[1] *Engelke* v. *Musmann*, [1928] A.C. 433. By statute the extent of the Crown's foreign jurisdiction in any place is determined by a Secretary of State's certificate.

[2] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797; K. & L. p. 316; *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149.

According to the rules of international law the Crown is represented at foreign capitals by diplomatists of various ranks, from the Ambassador to the chargé d'affaires, and similarly the Crown receives representatives of foreign States, in either case care being taken to secure that the person appointed shall be acceptable to the government concerned. Treaties are negotiated for the Crown in foreign States under full powers signed by the King on the authority of the Foreign Secretary, and are ratified by the King on similar advice, ratification being delayed until any necessary approval of Parliament or legislation has been secured. Or the Foreign Secretary may similarly act with the diplomatic representative of the foreign State at the British Court. The control of treaty-making by the government is, of course complete in every detail, and individual discretion is not now left to diplomats in view of the facilities for telegraph intercourse. In commercial matters the Board of Trade is chiefly responsible for the determination of the terms to be accorded. The collection of trade information in foreign countries is carried on, under the supervision of the diplomatic agents, in the main by consular officers appointed to foreign States with the assent of their governments, similar officers from these States being received in British territories, and the Overseas Trade Department is specially charged with the development of British trade in foreign countries and the Dominions. On political issues information is collected by the diplomatists.

It is the duty of the Crown to secure that all necessary steps are taken for the co-operation of the Empire in the League of Nations, the Covenant of which has been approved by Parliament. Hence steps are taken for the due representation of the Empire[1] on the League Council, on

[1] The representatives on the Council and the League primarily speak for

which one seat is permanently granted to the British Empire, and on the Assembly, where the Empire is entitled to three representatives. The government further co-operates in efforts to secure international agreements under the aegis of the League, as in the case in 1930 of the effort to check increases in tariffs, and in accordance with the requirements of the Covenant all treaties concluded by the United Kingdom are duly registered with the League Secretariat, which is a condition of their validity. It rests also with the government to secure the due observance of the Treaty of 1928 for the renunciation of war.

It is admittedly necessary for the Commons and Lords to accept without minute inquiry the general conduct of foreign affairs by the government, in view of the danger of creating ill-feeling in foreign countries by discussions in Parliament. But the right to ask questions and to demand opportunities for special debate, as well as the regular opportunity of criticism on the Foreign Office vote, are undoubted, and the government may be pressed to lay papers, when it will either comply or explain why it is inadvisable thus to proceed. In 1930 the correspondence with the Vatican regarding clerical intervention in the Maltese elections, when the Bishops forbade voters to cast their suffrages for Lord Strickland, Head of the Ministry, was duly brought down. The question has repeatedly been raised of the desirability of adopting the continental practice, which has an analogue in the United States, of setting up a Foreign Affairs Committee of Parliament with right to full information and discussion. Foreign affairs are normally regarded as most unsuitable for party divisions, and risk of erroneous treatment, which might lead to breach of this convention, might, it is suggested,

the United Kingdom and the parts of the Empire other than the Dominions and India, which are separate members of the League.

thus be obviated. But no government has shown any willingness thus to part with an essential power.[1] It is important to note that the ministry has in this connexion very wide authority, for, as it need only receive the approval of the House of Commons, so long as it retains a majority there, it can practically act unfettered in foreign relations.

§ 5. *The Executive and Legislation.*

The predominance of the executive in initiation of legislation over the private member has already been noted. The summoning and dissolution of the legislature lies in its hands, and it tends to demand more and more of the time of that body for its legislative projects. Thus the Standing Orders give precedence to government business until Easter on every day save Wednesday and Friday, which is a short day. After Easter it has precedence save on the first four Fridays; after Whit-Sunday all the time is taken save the third, fourth, fifth, and sixth Fridays after Whit-Sunday. The causes of this monopoly are no doubt adequate, in that no private member can really deal effectively with the administrative, technical, and financial difficulties which must be faced in any scheme of social betterment. The government again, since 1869, has the aid of parliamentary counsel in drafting laws, and it is often necessary that it should initiate legislation to carry out international conventions, as in the case of the conventions as to hours of labour and conditions of employment of women and young persons agreed on at conferences under the auspices of the League.

But in addition to the duty of initiation the Crown

[1] In June 1930 the government refused to allow the London Treaty on Limitation of Naval Armaments to go to a Select Committee as suggested by Mr. Baldwin. For foreign usage see Parl. Papers, Cd. 6102 (1912), Cmd. 2282 (1924).

possesses certain rights akin to legislation. Thus it can incorporate bodies of men and give them a new status with perpetual succession.[1] Its regulations for the civil service, however, are not legislative, but merely formulate conditions of employment, and its regulations for the defence forces are statutory, even if once based on prerogative. Its powers to regulate commerce in time of war, and to control the movements of subjects from the realm in war, if that still exists, fall under the prerogative as to foreign affairs. In the case of colonies the Crown possesses several powers. In the case of a colony acquired by settlement of British subjects, it can by Letters Patent or Order in Council confer a constitution of a representative character, as is now the case with Newfoundland; but it cannot legislate (apart from statutory authority which is given by the British Settlements Act, 1887, in respect of certain territories). As regards ceded or conquered colonies, the Crown can bestow any form of constitution it desires, and it can pass any kind of legislation by Order in Council, unless and until it confers a representative constitution, without reserving the right to legislate.[2] As regards British subjects in foreign countries, the Crown has no prerogative power of legislation, but in certain cases, explained later (chap. xi), has full authority, as in the case of a conquered colony, under the Foreign Jurisdiction Act, 1890.

In the United Kingdom real legislative power is exercised practically only under authority given by Parliament. Even the proclamation of a moratorium in war which might seem within royal authority under the prerogative

[1] This power belongs even to Canadian provincial Lieutenant-Governors; *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566.

[2] *Campbell* v. *Hall* (1774), 1 Cowp. 204; K. & L. p. 420. The responsible government of Malta was suspended in June 1930 under the power reserved in the Maltese Letters Patent, 1921.

was sanctioned at once by Act in 1914, and the Defence of the Realm Act supplied full power to make any regulations for the defence of the realm. This practice of ascribing power freely to make regulations has undoubtedly placed a vast measure of authority in the hands of the ministry, and it has not gone without serious protests being raised. It must, however, be remembered that there is often necessity for such legislative authority. If emergencies arise, it is better on the whole that the Crown should be able to make regulations binding on the subjects than that it should proceed by orders, which have no legal basis and must be made valid *ex post facto* by Act of Indemnity. Further, apart from emergency, it is very difficult to include in a statute the whole of the details which may be necessary to make it effective. Moreover, if statutory validity is given without power of change save by statute, much that is erroneous may long stand, while regulations can be amended easily if imperfect. It would, it must be admitted, be impossible for Parliament to legislate effectively at all if it had to deal with all the details involved in any great measure. Either it would be compelled to devote a session to one or two measures, or it must pass by means of the closure in one form or other huge masses of details without discussion. In foreign constitutions it is often assumed, as in France and the German Reich, that power to issue detailed regulations to make laws effective is implicit in every case. It is significant of the growing complexity of the work of the modern State that, whereas it was possible in the early workshop and factory acts to include detailed regulations, such procedure should now be unthinkable.

The power to legislate takes various forms. Very commonly it is to supplement a general enactment such as the Seeds Act or the Roads Act of 1920. Or the executive is

allowed to determine the date when an Act shall become operative or the area to which it shall apply. Thus under the Copyright Act, 1911, the foreign countries to which the Act applies are specified by Order in Council with any necessary limitations. Or the adaptation of earlier statutes is allowed, as in the case of the Irish Free State (Consequential Provisions) Act, 1922, or the Air Force Act, 1917. Or power may be given to alter existing Acts or even the Act itself, a practice set in the Coal Mines Act, 1911, and continued in the Mining Industry Act, 1920, and not rarely since imitated. The forms of legislation vary. The most imposing is by Order in Council, and the rules as to aliens and aerial navigation as well as to safety of life at sea are usually thus formally dealt with. Regulations by a ministry are more common, while rules are the title usually given to regulations of a procedural character, and orders often are no more than executive decisions which do not really deal with legislation.

In certain matters which normally would form the subject of private Bills departments are permitted to issue provisional orders which are converted into legislation by being scheduled to a Bill, which is then introduced by the authority of the department and accepted as a rule very summarily by Parliament, the department being held to have taken due care that the measure is in order. In a few cases, however, such orders need no confirmation; an instance is presented by orders as to pilotage districts and authorities made on application under the Pilotage Act, 1913. The maintenance of piers and harbours, construction of docks and tramways, the enclosure or regulation of commons, are among the many miscellaneous subjects on which power is given. A similar procedure is provided for under the Private Legislation Procedure (Scotland) Act, 1899, and local Acts in Scotland are dealt with in this

effective manner. There is a recent tendency evidenced by the Gas Regulation Act, 1920, to simplify still further by permitting the issue of orders by the Board of Trade where provisional orders confirmed by Parliament were once necessary. Provisional Orders normally take effect only after their confirmation by Parliament.

However convenient such powers of legislation may be, it is obvious that serious risks are involved of the executive imposing rules which the legislature would not accept, if they were formally placed before it for acceptance and discussion permitted. The numbers of amendments accepted to public bills is eloquent of the imperfection in the eyes of Parliament of departmental proposals. Hence efforts, not very successful, have been made to secure Parliamentary control of regulations. (1) Regulations in some cases must be laid before both Houses, and approved by resolution, before they become effective, as is provided in the Gas Regulation Act, 1920. (2) Regulations must be laid in draft before the Houses, and shall become effective, unless either House presents an address against the draft within a specified time, as in the Importation of Animals Act, 1922.[1] (3) Regulations may be issued, but may be annulled on address from either House within a specified time, as under the Irish Free State (Consequential Provisions) Act, 1922. (4) Regulations must simply be laid before Parliament, which then can legislate to annul them. It is clear that for all practical purposes only the first mode of dealing with regulations gives Parliament any real control, and naturally it is not favoured by departments.

In certain cases there is special provision that persons or bodies interested may either make representations before

[1] By a variant in the Local Government Act, 1929, s. 130, orders adapting the Act take effect, but lapse in three months if not approved by both Houses.

rules are issued, which must be considered by departments, or may insist on the rules being confirmed by legislation. The Rules Publication Act, 1893, has a general provision for publicity, requiring that forty days' notice of the proposed issue of a rule must be given if it is required that the rule shall on issue be laid before Parliament. But there are many exceptions in the Act itself and others have been added, nor is the protection of much value.

The judiciary, therefore, remains as one means of protecting the subject from abuse of power by governmental legislation. The issue arose on several occasions during the war of 1914–18 whether particular regulations could be held to be authorized by the power to make regulations for public safety and the defence of the realm. Was it enough that the executive thought the regulation requisite? It was ruled in *Chester* v. *Bateson*[1] that it was impossible to justify a regulation requiring that no person without the consent of the minister of munitions should take steps to recover possession of houses in certain areas so long as munition workers were living therein. It was impossible to say that the safety of the realm demanded refusal of access to the Courts, though a regulation forbidding the Court to give an order of ejectment might have been valid. So again it was ruled[2] that a regulation taking away from the subject the right to a judicial decision as to the value of rum requisitioned could not be held legitimate under the Act; it cannot be supposed that the legislature would authorize the taking of property without due compensation. The Courts also intervened to forbid action by the executive in excess of the powers given by regulations, in themselves not *ultra vires*. Thus, though it was not held improper to issue a regulation for the requisitioning of

[1] [1920] 1 K.B. 829; K. & L. p. 21.
[2] *Newcastle Breweries Ltd.* v. *R.*, [1920] 1 K.B. 854; K. & L. p. 10.

steamers, it was ruled in *China Mutual Steam Navigation Co. Ltd.* v. *Maclay*[1] that it was illegitimate to requisition not merely the steamers but the services of their crews, which was not covered by the regulation. On the other hand, the Courts declined absolutely to decide the question whether a particular act in accord with the terms of a regulation was justifiable in view of the actual necessities of the moment. If the executive had power to take land,[2] or to refuse licences to ships,[3] no Court would decide whether it should or should not take a specific piece of land, or refuse a licence to a special ship.

Unfortunately the salutary influence of the judiciary has recently been impaired by the habit of enacting not merely that regulations may be made, but that 'they shall have effect as if enacted in this Act'. Instances are found in the Ministry of Transport Act and the Electricity (Supply) Act of 1919, the Gas Regulation Act, and many later Acts. The effect of such an enactment was ruled in the case of *Institute of Patent Agents* v. *Lockwood*[4] in a matter arising out of the Patents and Designs and Trade Marks Act, 1883, to be to exempt the rules from examination by the Court, and it has recently been argued by the Attorney-General that, whatever may be ordered by a department in such a case, however remote from the purpose of the Act, must be regarded by the Courts as valid legislation, the legislature having as it were given the executive a blank cheque. But in *R.* v. *Electricity Commissioners*[5] it was ruled that the Courts might intervene by prohibition when the Commissioners had formulated a scheme not authorized by the Act, though the Act provided that on confirmation by the

[1] [1918] 1 K.B. 33.
[2] *Sheffield Conservative Club Ltd.* v. *Brighten* (1916), 85 L.J.K.B. 1669.
[3] *Hudson's Bay Company* v. *Maclay* (1920), 36 T.L.R. 469.
[4] [1894] A.C. 347.
[5] [1924] 1 K.B. 171; K. & L. p. 187.

Minister of Transport the scheme should have effect as if enacted in the Act; it was, however, suggested that it could have done nothing after confirmation. Since then it has been ruled that, if a housing scheme is not in accordance with the Act, confirmation will not give it validity, for the Act gives such validity merely to schemes in accord with its provisions.[1] The issue is most interesting, for, if the full claim of the Crown were admitted, it would be most dangerous to entrust powers to the executive. As it is, there is a good deal to be said for the view that the provision that regulations should have force as if enacted in the Act should not be inserted in statutes, and that departments in making regulations should be subject to control, e.g. by committees of the Houses of Parliament, who must be consulted before any regulation was issued, so that they could raise the issue in Parliament if necessary.

§ 6. *The Judicial Functions of the Executive.*

Naturally enough, with the extension of governmental activities into new fields of activity, it has become common to entrust to executive authorities the right of deciding administrative issues in place of a reference to the ordinary courts.[2] The Road Traffic Act, 1930, gives to the Minister of Transport authority to decide appeals from refusals of licences to run omnibuses. Claims for unemployment benefit under the legislation on that topic are dealt with by the local manager of the local Employment Exchange, on appeal by the Court of Referees, composed of equal numbers of representatives of employers and employed, with an independent chairman, chosen by the Minister of

[1] *Rex* v. *Minister of Health, Ex parte Yaffé* (1930), 46 T.L.R. 373; [1930] 2 K.B. 98; Housing Act, 1925.

[2] The functions of the Railway and Canal Commission and the Railway Rates Tribunal under the Railways Act, 1921, are really judicial; they are courts of record from which appeal lies to the Court of Appeal.

Labour,[1] and finally by the umpire, who is a lawyer and impartial, but from whom there is no appeal to a court of law. The Minister of Health has enormous power of decision of disputes, between a society and an insured person, between two societies, or arising out of the medical treatment of insured persons, or the supply of drugs by chemists. The Minister may fine or remove from the panel a peccant doctor, and can penalize improper supplies of medical aids or inaccurate dispensing; he can punish extravagant prescriptions, and he actually might order a local authority to pay the extra cost of excessive sickness in any area if he held it caused by its neglect to provide sanitation. The Board of Education again decides whether a new public elementary school is, or is not necessary, if any objection is raised by ratepayers or managers of an existing school, and decides disputes between local authorities and managers of non-provided schools, and in many other cases. The Board of Trade in maritime issues and under the Gas Regulation Act has certain judicial powers, and the Minister of Health is a tribunal of appeal under the Old Age Pensions Act, and under the acts as to public health from orders by local authorities requiring private persons to carry out their instructions, and from various questions as to housing.

The wide extent of the powers thus granted was brought out by the House of Lords' decision in *Board of Education* v. *Rice*[2] where the issue was one of alleged discrimination by a local authority against non-provided schools as regards salary rates. It was then admitted that both issues of law and fact fell to be decided by the Board and that it must

[1] The Industrial Courts Act, 1919, allows the Minister to set up a Court of Inquiry, when a trade dispute exists or is apprehended, with power only to report.

[2] [1911] A.C. 179.

act fairly, in the sense of hearing both parties and giving both the opportunity to correct or contradict statements prejudicing their case. But it was not demanded that the Board should proceed in the manner of a court of law; it had no power to impose an oath and need not examine witnesses. In the *Local Government Board* v. *Arlidge*[1] the matter was carried further. An appeal was brought to the ministry by Mr. Arlidge against an order to close a house, and was rejected, and he then asked for relief from the Court because he had not been heard personally by the officer who determined the appeal, nor had he been allowed to see the report of the inspector who under the statute had held a local inquiry on the issue. The House of Lords declined to admit the injustice of the ministerial procedure, merely insisting that the inquiry and decision should be conducted in a judicial spirit, but not necessarily by judicial procedure. Nor is it necessary that reasons be adduced, as in an ordinary judgement, nor is the minister precluded from reopening and reversing his own decisions. It will be seen that these decisions leave comparatively little room for judicial intervention, and it cannot be regarded as wholly satisfactory that matters of great public and private concern should be decided so informally, by officers whose decisions are virtually accepted by the minister without much personal concern, but who know the general trend of the aims of the minister and may be excused for seeking to further the doubtless benevolent aims of their chief, even at the cost of the individual. It seems clear that such appeals should at least be dealt with by a special staff in each ministry; that hearings should be oral and public; that power should exist to compel the appearance of witnesses and the production of documents; that decisions should be reasoned, and that appeal should lie to a

[1] [1915] A.C. 120; K. & L. p. 199.

Supreme Administrative Tribunal, while in some cases at least there should be, on Administrative Tribunals, representation of the interests which will be affected by their decisions. It is doubtless useless to seek to transfer to the ordinary courts the vast mass of business now handled administratively, but there is no ground for not improving and introducing a more judicial system into the treatment of such cases. In fact there now exists a *droit administratif* of a type far inferior to the French where jurisprudence has evolved a most carefully worked out system for protection of the public from misuse of official power. It might be well to make members of tribunals legally liable where there can be proved against them malice, negligence, corruption, or fraud in their work.

§ 7. *National Finance.*

A most important part of the work of the executive consists of the management and expenditure of the national revenue, and, as we have seen, the denial of the power to tax by the prerogative is reiterated in the Bill of Rights, 1689. The rule is strictly interpreted as was shown in *Attorney-General* v. *Wilts United Dairies.*[1] The executive under powers granted by statute to regulate the supply and consumption of food during the war forbade the purchase of milk by dealers in one area for removal to another area, except under licence, and then charged 2*d.* a gallon for the grant of licences. This was attacked as in effect taxation without statutory authority, and the plea prevailed, though the War Charges (Validity) Act, 1925, was passed to obviate the unfair consequences to which the success of the plea would have given rise. In precisely the same spirit the Courts declined to hold that a resolution of the House of Commons fixing the rate of income tax

[1] (1921) 37 T.L.R. 884; K. & L. p. 119.

justified the collection of tax at that rate before the resolution had been embodied in an Act,[1] and it was found necessary to pass the Provisional Collection of Taxes Act, 1913, under which collection is allowed, subject to an Act being passed within four months of the resolution imposing income tax or customs or excise duties.

It rests with the executive to prepare estimates of expenditure under heads and subheads for approval by Parliament and ultimate embodiment in an Appropriation Act, and any sums not included which prove necessary must be provided for by an additional Act.[2] It rests also with the executive to see that, when money is voted, it is drawn in the proper manner by officers duly authorized and expended as directed in the Act, subject to the rule that in defence expenditure there may be transfers between separate votes, parliamentary approval being later secured. Finally it must present at the close of the year accounts showing how the appropriations have been dealt with, the sums that have not been expended and can be surrendered, and any excess of expenditure over the amounts authorized which must be regularized by further grants.

The function of the House of Commons, which since the Parliament Act, 1911, has absolutely unquestioned control of finance, in checking the actions of the executive is difficult of accomplishment and, in fact, fails to be effective. It is practically impossible effectively to criticize the estimates presented; the mode of procedure necessitated by lack of time results in attention being concentrated on some items only, of which political capital can be made, and many millions of pounds are automatically voted at

[1] *Bowles* v. *Bank of England*, [1913] 1 Ch. 57.

[2] Urgent needs can be financed temporarily from the Civil Contingencies Fund, and for remittances abroad the Treasury Chest Fund. But the sums used must be replaced by Parliamentary authority.

the close of the time allotted for discussion in Committee of Supply. An effort in 1912 to secure better control by appointing a standing committee on the estimates proved unsatisfactory. It was argued that it implied an interference with executive responsibility which might lead to loose estimating; that the Committee was ineffective in criticism because it could not deal with the estimates so far as they were based on policy, a restriction which might exclude all useful investigation; that the estimates were only referred to the Committee after they had in considerable measure been approved by the House, so that any criticism were only of value, if at all, for the future; and that the Committee had no trained officer to aid it. The Select Committee on National Expenditure in 1918 made suggestions to meet the last two difficulties, but reluctance of the government to surrender authority led to no effective power being given to the Estimates Committee. Nor has much progress been made in carrying out the useful object of so framing estimates as to show the objects on which expenditure is defrayed, in such a manner that it is possible to compare the expenditure of departments and determine its economy. It was admitted before the Committee of 1918 that 'the control of expenditure in the sense of securing that the various public services are efficiently administered at reasonable cost was no part of the object which the framers of the system (of appropriation of grants) had in view'.

The real control of expenditure rests with the Treasury,[1] aided by the Comptroller and Auditor-General under the Exchequer and Audit Departments Acts of 1866 and 1921.

[1] Each department has an accounting officer, whose business it is to secure that no payment is made without due authority and who is personally liable. But he is not a servant of the Treasury and can be overruled by the minister.

The latter is an officer of independent status, his salary being charged on the consolidated fund, and he can be removed from office only on addresses to the King from both Houses. He is, however, appointed by the executive, not by the House of Commons, and reports to the Treasury, not direct to the House, though virtually he represents its interests. In the preparation of estimates the Treasury alone is concerned. In October it asks for detailed estimates from each civil department and settles them in consultation with the department, final decision being taken by the Cabinet; in the case of the defence services the matter is settled by the totals being agreed upon by the Cabinet in the first place, after which detailed estimates are submitted to the Treasury. It is at this period that scrutiny is most valuable, as unhappily ministers regard the proposals submitted as sacrosanct, and have always considered any defeat on a money vote a matter of the most grave importance.

All revenue as it is received is normally lodged with the Bank of England or Ireland to the Exchequer account, and the Treasury and the Comptroller and Auditor-General must co-operate to render it available for the purposes for which Parliament appropriates it. Such appropriation takes the form either of annual grants, Supply Services, or permanent grants, Consolidated Fund Services, the latter of which are not granted to the Crown but to the specific objects mentioned in the Acts. To make available the funds in the Exchequer, it is necessary in the case of supply services to obtain a royal order to the Treasury, authorizing it to instruct the Banks to make sums available, and the Treasury must then obtain from the Comptroller and Auditor-General authority for the Banks to act on its instructions. This authority he can only give after satisfying himself that Parliament has duly voted the amounts,

or in the case of consolidated fund services that permanent legislation exists. The Treasury now can instruct the Banks, the authority being given to transfer the amounts specified to the account of the Paymaster-General, who acts for the departments other than those which collect revenue, or to that of one of the revenue collecting departments, the Comptroller and Auditor-General being duly informed of the transfers.

To see that the money expended has been applied for the purpose for which the grants made by Parliament were intended to provide, and that the expenditure conforms to the authority which governs it, is the business of the Comptroller and Auditor-General, who carries out through his officers an audit intended (1) to check the correctness of the computations made in the accounts and the presence of due vouchers for all expenditure; (2) to insure that expenditure is charged to the proper head of each account; and (3) to ascertain that each particular payment was duly authorized. These offices are performed on the appropriation accounts of the department and he reports on them, calling attention to cases of excess expenditure on votes and to instances of other irregularities, even where no excess results. It is possible to call attention to cases of wastefulness or imprudence in expenditure. The accounts and the report are then considered by the Public Accounts Committee,[1] appointed annually by the House of Commons, which reports to that body calling attention to irregularities. The chief value of the report is probably the fact that it enables the Treasury to censure a department which has been lax in expenditure, for the House of Commons takes not the least interest even in reports showing gross incapacity and stupidity in spending

[1] Usually of fifteen members. Excess grants should be submitted to it before submission to the Committee of Supply.

public funds. Nor is the Treasury itself sufficiently heedful of financial propriety, as may be seen from the fact that an illegal increase of salary was made in 1920 to the Comptroller and Auditor-General himself, and no legislative sanction was obtained until August 1921. There can, however, be no doubt on the whole that public funds are normally honestly if not cleverly applied, but there is a regrettable lack of effective examination of possibilities of economy and far too little attention is paid to the probable effects of legislation on social issues in burdening the resources of the State.

IV

THE LEGISLATURE AND ITS FUNCTIONS

§ 1. *The House of Lords.*

PARLIAMENT, as we have seen, emerged from the meeting of the King's Council with barons, clergy, and representatives of the counties and boroughs, and only gradually were there eliminated from it those who were not either peers or elected representatives. Traces of the old order are seen in the fact that Privy Councillors are entitled to be present, though not to vote, at sittings of the Lords, and judges and the law officers receive a formal summons to be present to assist the Lords, which now is not obeyed. The fact that the royal assent is given in the Lords, that its Clerk is Clerk of the Parliaments, and that a peer withdraws when the Commons clear the house of strangers, are reminders that the Commons were an accretion to rather than an integral part of the central conclave. The clergy by their own action in preferring to be taxed in their convocations rendered possible the carrying of the Reformation proposals of Henry VIII, and in 1664 by a mere verbal agreement between the Lord Chancellor and Archbishop Sheldon was carried out the fundamental change that the clergy accepted taxation by the Commons, exercising henceforth the franchise, though not entitled to seek election to the house.

The Lords is composed of the Lord Chancellor, who, if a peer, sits without summons and presides over it, over 700 hereditary peers, Dukes, Marquesses, Earls, Viscounts, and Barons; the Archbishops of Canterbury and York, the Bishops of London, Winchester, and Durham, and twenty-one other Bishops in order of seniority; sixteen Scottish

peers elected by other Scottish peers for the duration of Parliament; twenty-eight Irish peers elected by the Irish peerage for life (whose position is now anomalous owing to the creation of the Irish Free State), and seven Lords of Appeal in Ordinary, who are appointed as peers for life in order to act as the nucleus of the House of Lords in its judicial capacity. Other peerages are hereditary, and in modern usage are always conferred by letters patent, being descendible to lineal heirs male, but special remainders are possible. Older peerages mark the rule that at an uncertain date the fact that a man's ancestors had received and acted on a summons to Parliament created a hereditary right to such a summons.[1] Such peerages can descend to women, but they enjoy no right of summons, nor has this been altered by the general terms of the Sex Disqualification Removal Act, 1919, as was ruled in Lady Rhondda's case. An heir succeeding to a peerage, if in the Commons, loses his right to sit, and attempts to evade this rule have been defeated, an awkward result since, as Lord Curzon's case shows, any aspirant to the Prime Minister's office must remain in the Commons. The expansion of the house began with George III, in whose reign 116 peerages were added, many for ignoble causes, and this bad precedent was followed by Mr. Lloyd George's coalition ministry, resulting in the passing of legislation against peerage brokers. But many men of eminence as politicians or diplomats or civil servants have been added, and the present house contains unquestionably a large number of skilled members, as is shown by their capacity in debate and discussion of foreign and colonial issues. The drawback is that a large proportion of members have no other claim than inheritance to justify their presence, are

[1] *Clifton Peerage Case* (1673); *Freschville Peerage Case* (1677); *Beauchamp Barony*, [1925] A.C. 153.

uninterested in politics, often do not even take their seats, but can be induced to vote on occasion chiefly in order to meet attacks on property, the House now essentially representing all forms of wealth.

§ 2. *The House of Commons.*

The House of Commons at present consists of 615 members, of whom seventy-four represent Scottish constituencies, thirteen Northern Ireland, and the rest England and Wales. They are elected mainly for single member constituencies[1] on the principle of a majority vote, proportional representation being confined to the University constituencies, by electors who comprise all male and female British subjects of 21 years of age and upwards, who are qualified by three months residence in a constituency or occupation[2] of business premises of the annual value of at least £10, or who are graduates of a University. An elector may only cast two votes, one of which must be in respect of residence. There are excluded idiots and lunatics, peers, persons under sentence for treason or felony, or convicted of corrupt or illegal practices, and returning officers. Disqualifications for election or sitting include minority, lunacy, conviction of treason or felony if the sentence exceeds a year's imprisonment, unless a pardon has been granted or the sentence has expired, bankruptcy, conviction as a parliamentary candidate for corrupt practices, being a cleric of the Churches of England or Scotland or the Roman Catholic Church, peerage (save that Irish peers, not being members of the Lords, can serve), holding a government contract, and tenure of most civil offices. Roughly speaking no holder of office under the Crown can

[1] The City of London and twelve boroughs have two members apiece.

[2] A husband or wife is qualified also in respect of his wife's or her husband's occupation of premises. Since 1872 election has been by ballot.

be elected or retain a seat, unless he is the holder of a political office, whose position depends on the coming in or going out of office of the government. Re-election was formerly required in most of these cases if appointment to office took place after election to the Commons, but in 1919 and 1926 this requirement disappeared. It was long justified by the feeling that, if a member was given ministerial rank, it should be open to his constituents to pronounce judgement on his taking office and the governmental record to date. It was, of course, on the other hand, a hardship that the choice of new ministers often had to be based in a considerable degree on calculations of the chance of losing the seat, so that a good man was passed over for one inferior.

Membership was originally rather a painful duty rewarded by the right to payment from the constituency than an honour, and the right to resign was strenuously denied. Not until 1715 was it realized that by securing an office technically, even if not actually, of profit, resignation could automatically be achieved, and only from 1779 has the rule been absolute that resignation through the grant of the nominal Stewardship of the Chiltern Hundreds is practically a matter of course. Payment of members dates from 1911 at the rate of £400 per annum, but with income tax and free travel privileges.

The salient defect in many eyes of the Commons is the fact that under the system of election there may be a painful discrepancy between the number of members returned and the number of votes cast for them in the country. Thus the Conservative Government of 1924–9, which had an overwhelming majority over the two branches of the opposition, represented less than half the votes cast, and the Labour Government of 1929 and the Conservative opposition obtained representation wholly disproportionate

to that of the Liberal opposition.[1] The present system, wrote Mr. MacDonald at one time, 'turns the body of electors into a disorganized crowd, and breaks the unity between local governing groups and Parliament'. Larger constituencies, e.g. Manchester, as a unit with ten members, are, it is argued, more natural, and would allow of the system of preferential voting, so that the voter would express his choice of the candidates he preferred and then in order for his subsequent preferences. As a result of transferring these votes, every substantial minority would obtain something like its fair representation in Parliament, and the security of the State would thus be much enhanced, seeing that impotent minorities are easy prey to the enemies of democratic rule. Moreover, extremes of policy would be avoided, and the excessive acerbity of two sharply opposed parties would be eliminated. On the other hand, it has been argued that the large constituencies would destroy personal touch between member and constituents; that the cost of elections would be increased seriously for the candidate, and his work enormously complicated; that political party management of voting in constituencies would be accentuated; and that by-elections would be impossible of satisfactory arrangement. Further, the existing system produces stronger governments than would that proposed, and government of the British type is far better conducted on the basis of firm party support than on reliance on the bargaining of the groups, into which the system of proportional representation would tend to divide the House of Commons. These views prevented any

[1] 34,000 Conservative votes won a seat, 29,000 Labour votes, 90,000 Liberal votes. An abortive conference on electoral reform under Lord Ullswater was held, Dec. 1929–July 1930 (Parl. Papers, Cmd. 3636). In Dec. 1930 the Labour government adopted the policy of the Alternative Vote to secure aid from the Liberal party in the modification of the Trade Disputes and Trade Unions Act, 1927.

general acceptance of the doctrine of proportional representation at the Speaker's Conference of 1916–17 by which the proposals adopted in 1918 for the wide extension of the franchise were framed. The Conference, however, favoured the alternative vote for single member constituencies under which the elector indicates his preference, and the candidate who receives the lowest number of votes is eliminated, his second preferences being duly transferred to the others. It is clear that the system is faulty, but it is far more commonly adopted in the Dominions than proportional representation proper, which exists in Tasmania, in the Senate of the Union of South Africa, and to a limited extent in the Canadian Provinces. Its adoption forced on Northern Ireland in 1920 was removed by the local Parliament. The second ballot which New Zealand and New South Wales tried had been decisively rejected as leading to the most undesirable bargaining after the first ballot. Not unnaturally at present the Labour party, once a believer in proportional representation, has ceased to care for a system which would result in prolonging the life of the Liberal party and perpetuating the three-party system.

§ 3. *The Relations of the Two Houses.*

The advance of democracy has inevitably resulted in the House of Lords appearing more and more anomalous as a second chamber. With the gradual emergence of the struggle of the poorer classes to secure a more even distribution of the wealth of the country, the upper chamber has come more and more to serve as a bulwark of property against the demands of equality, and, as men of wealth tend to be Conservative in all things, the chamber has come to be overwhelmingly representative of the views of the Conservative and Unionist party. But the conflict

between the two Houses over taxation began early; in 1678 the Commons declared its sole right of initiation of supply and denied the power of the Lords to alter such measures, thus in effect claiming sole right to tax and appropriate. In 1860 the Lords brought the matter to an issue on a further point, the right not to alter but reject, by refusing to accept the Paper Duty Repeal Bill, with the result that Mr. Gladstone not merely secured the reiteration of the claim of 1678, but the adoption, next year, of the device of including the repeal of the duty with the other financial proposals, and thus the Lords were compelled to yield. But the power to control legislation generally remained, and the refusal to pass the Home Rule Bill of 1893 would have been followed if Mr. Gladstone had had his way by an attack on the Upper House. This was, however, delayed until the Conservative debacle and until, in 1906, the Lords, who had shown no serious criticism of Conservative measures for ten years, began to destroy proposals for which their rivals claimed a popular mandate. In 1906 the Plural Voting and the Education Bills, in 1908 the Licensing Bill, and in 1909 the Finance Bill, Mr. Lloyd George's famous budget with its land taxation, were rejected. The last step was clearly foolish; Parliament was dissolved, giving the government with its Labour and Nationalists allies a majority of 123. Resolutions to secure the Commons undivided authority in finance and predominance in legislation were brought forward, but Edward VII's death on 6 May delayed action, and in view of the difficult position of the new King a Conference between four leaders on either side sought in vain an accommodation. A dissolution was, therefore, determined by the government after obtaining the necessary promise from the King of the creation of sufficient peers to override the Upper House, as had been done in 1712 to carry the

Treaty of Utrecht, and successfully threatened in 1832 to carry the Reform Bill. The election gave the same result as in January, and in 1911 the Lords accepted the Bill. Under it the Commons has undivided authority over money Bills, for, if sent up to the Lords at least a month before the close of the session, such a Bill if not accepted within a month by the Lords is to be presented to the King for assent, unless otherwise directed by the Commons. Every Bill so presented must be certified by the Speaker after consulting two members of the Chairmen's Panel, selected at the beginning of each session by the Committee of Selection, as containing only provisions dealing with taxation, the imposition of charges on the Consolidated Fund, supply, the appropriation, receipt, custody, issue, or audit of accounts, and the raising or guaranteeing of any loan. The Act has no application to the finance of local bodies. In the case of any other legislation (except a Bill to extend the duration of Parliament beyond the term of five years, now fixed for its normal life, or to confirm a provisional order[1]) if a Bill is thrice passed in successive sessions by the Commons, having been sent up at least a month before the end of the session, and two years have elapsed since the second reading in the first session and the final passing in the third session, and if it is not accepted by the Lords, it is to be presented for royal assent, unless the Commons otherwise directs. A certificate of compliance with the terms of the Act must be given by the Speaker, and it cannot be questioned in any Court. Amendments made by the Lords may be accepted by the Commons. It may be noted that the definition of money Bills has proved curiously vague, and that several of the Finance Bills since its passage have, in fact, not been capable of certification by the Speaker as money Bills. The exercise of the Speaker's

[1] This is akin to a private Bill, to which the Act does not apply.

discretion has often been objected to, but no single instance has ever been adduced in which it can even be plausibly claimed that he has erred.

The passage of the Act undoubtedly secured the acceptance despite the Lords of the disestablishment of the Welsh Church, and but for the war of 1914 would have given Ireland a form of home rule. It has since acted as a steady control on any tendency of the Lords hastily to amend or reject legislation, and has undoubtedly enormously reduced the power and prestige of the House as a legislative body. This was, of course, recognized as the inevitable result when the Act was passed, and the preamble promises the creation of a second chamber on a popular, as opposed to a hereditary base. This promise has never been implemented, though Lord Bryce's Committee in 1918 made elaborate proposals. It was recognized that the functions of a second chamber included revision of legislation, which in the Commons often passed under a time limit; the initiation of non-party measures, which, when put in shape, might have an easier passage through the Commons; the interposition of so much delay in passing a Bill as might be needed to secure the full expression of the opinion of the nation upon it, especially in the case of constitutional changes, new issues, or matters on which opinion was equally divided; and the discussion in a body, on whose views the fate of the government did not depend, of important questions such as matters of foreign policy. The idea of election, nomination, or heredity alone as the basis of membership was rejected, and in place 246 members were to be selected for twelve years by the members of the House of Commons grouped in thirteen areas, and eighty-one by a Joint Standing Committee of both Houses, with a minimum of thirty peers. Elaborate provisions were made to secure the Commons full power over financial measures

only, carefully defined, and for the settlement by the aid of a Joint Conference of deadlocks on general legislation. This complex plan evoked no enthusiasm, and the tentative efforts of Mr. Lloyd George's government in 1922, of Lord Birkenhead in 1925, and Lord Cave in 1927, met with no favour even from the Conservatives. The second last mentioned contemplated the composition of the house out of peers (120) qualified by experience in politics, administration, or the services, peers (150) co-opted by their fellows, and nominated peers. Clearly such suggestions have little attraction, and the Labour party would prefer to leave matters in the present position with the peers impotent for serious harm. A second chamber of an elective type, whether in larger areas by proportional representation or otherwise, would, it is felt, be a far more serious drag on socialistic legislation than the present House, which has no financial power and no popular mandate. The weakness of the House renders any suggestion of a referendum to decide issues between it and the Commons now out of place.

It has, however, occasionally been suggested that, if the Upper House were abolished, a referendum might be provided to the people on measures against which there was a strong minority of votes in the chamber, or on the application of a certain proportion of the electorate. It has also been suggested that the electorate should have the right to initiate legislation. Such proposals have little support in Dominion practice. The Canadian provinces have feebly experimented with both, and the Commonwealth constitution requires a referendum on constitutional change, a fact which has seriously hampered such changes and produced efforts to abolish the referendum. The Irish Free State constitution provided for both initiative and referendum, and warned by the risk in 1928 eliminated both.

Referenda on special issues, such as liquor prohibition, have been not uncommon in the Dominions, but those on compulsory service in Australia proved the impossibility of securing a vote on so delicate an issue in an affirmative sense when a ministry would not risk its fate on it. Hence the revival of the suggestion of a referendum on fiscal policy in the United Kingdom in 1930 was coldly received by students of politics, and soon dropped.

§ 4. *Parliamentary Procedure.*

Parliament originally was merely the single meeting of the barons and others with the King's Council, fresh elections being held for each session of a few days or weeks. Richard II, however, from 1389 saw the advantages of keeping in being a well-disposed house, and under Charles II Parliament was kept in being for eighteen years. The objections from the popular point of view to this procedure were obvious, and in 1694 William III accepted a triennial Bill, but in 1716 the necessity of safeguarding the Protestant succession induced Parliament to defer its demise by extending the life of Parliament to seven years, which remained the figure until the Parliament Act, 1911, substituted five. In the war of 1914–18 Parliament extended its own life until it had sat for seven and a half years. The existence of Parliament is now maintained continuously, one Proclamation by the King on the advice of the Privy Council being issued to dissolve the Parliament and to summon another, while an Order in Council requires the Lord Chancellor to issue writs directed personally to the Lords spiritual and temporal, and to the sheriffs and returning officers of counties and boroughs. When the returns have been made, the elections now being held all on one day, the Parliament is formally opened by

Commissioners to enable the Commons to choose the Speaker and take the oath of allegiance; later, the King opens the work of the year by a speech giving the policy of the government. The Speaker, who is the essential officer of the Commons, now once elected is re-elected so long as he cares to serve, and will be offered on retirement a pension and a peerage; his duty it is to claim the privileges of the Commons from the Commissioners, which are granted by the Lord Chancellor together with royal approval of the Common's choice. The Speaker, with the aid of his staff, including the Clerk of the House and the Serjeant-at-Arms, is charged in accordance with the Standing Orders with securing the orderly conduct of proceedings and practice. Defiance of the Speaker's rulings may entail suspension or expulsion.

After the session is commenced adjournment rests with the Houses themselves, but prorogation is a royal act performed through Commissioners, who likewise convey the royal assent which is pronounced by the Clerk of the Parliaments in Norman French.

The legislative work of Parliament falls under three heads. Public Bills are those chiefly in the public eye, and, as we have seen, the government is responsible for the introduction of the great bulk of legislation which passes. Private members, if fortunate in the ballot, may introduce Bills, and, if successful on second reading, they may be given facilities by the government or the government may take up the matter and introduce a Bill of their own. In any case discussion on a private member's Bill may be of effect in bringing the subject under popular consideration, and later bear fruit in legislation, as in the case of the factory acts, imperial penny postage, and summer time. Any public Bill, whether introduced by the government or a private member, passes through the same stages in the

Commons. Leave to introduce it is normally given without opposition, though this is possible if the Bill is very unpopular. The first reading is formal; the principle is discussed on the second reading, and thereafter, unless the House orders it to be committed to a special, i.e. Select Committee, or a committee of the whole House, or a joint committee with the Lords, it is referred to a Standing Committee, of which five are now set up. These consist of normally thirty to fifty members, to whom ten to thirty five members may be added for each Bill. The selection is made by the Committee of Selection, a body of eleven members representing the several parties, nominated by the House at the beginning of every session. In the case of Scottish Bills the Committee consists of all the members for Scotland, with ten to fifteen members specially nominated for each Bill. In Committee, whether of the whole House, or a Select or Standing Committee, the measure is discussed in detail and normally amended freely, the divisions being rather less strictly partisan than in the House as a whole, though the Committees are selected to represent fairly the different parties. If amended in a Committee of the whole House, and in any case if referred to a Standing Committee, it is considered again on Report, i.e. when reported from the Committee to the House, and then read a third time, when the principle is finally approved. A further stage may occur if, before being sent to a Standing Committee or one of the whole House, the measure is sent to a Select Committee, which may take evidence. After passing the Commons, it is sent to the Lords for similar treatment. If amended, the amendments are considered by the Commons, and if accepted the Bill can be assented to; if not, there are negotiations by message, rather than conference, under modern usage, and, if no agreement is reached the Bill falls to the ground. When in Committee

the Speaker is not in the Chair, which is filled by a Chairman appointed by the House.

In the case of finance measures, the estimates, prepared in consultation with the Treasury as described above, are presented before March 31 to the Commons. They are considered in Committee of Supply with the Chairman of Committees in the Chair. The old use that, on the motion that the Speaker do leave the Chair, amendments of criticism on any topic were in order, has been superseded since 1882 by the rule that only one amendment may be moved, relevant to the vote, on the first occasion on which the House goes into Committee of Supply on the Army, Navy, Air, or Civil Service Estimates or a vote of credit, the mover being determined by ballot. The rule that the Crown alone can propose expenditure through a minister prevents efforts to increase expenditure by private members, whose agreement to aid one another would soon impose excessive burdens on the State. The only constitutional method of asking for an increase is to move a decrease as a mark of disapproval. It also relieves members from pressure from constituents to propose local expenditure. In Committee of Supply the several estimates are passed and reported to the House for confirmation; when this is given, and a sufficient number of resolutions have been confirmed, the House in Committee of Ways and Means passes a resolution to provide for the aggregate of sums voted in Committee of Supply, and this resolution is confirmed by the House on report. Then follows a Consolidated Fund Bill, of which there may be several in a session. One is passed near the close of the financial year to provide the sums necessary to complete the service of the year about to close, and votes on account for the ensuing year. Finally, before the close of the session an Appropriation Act is passed, which gives authority to the Treasury

to issue the further sums voted since the last Consolidated Fund Act, including as usual borrowing powers, but also definitely appropriates the whole sums granted for the year to their specific purposes. Only some half of the expenditure thus requires annual appropriation, the defence and civil services; there are permanently charged on the Consolidated Fund the King's civil list, the salaries of the judges, and the interest and sinking fund of the public debt, &c. Similarly, much of the revenue is provided for by permanent Acts, but a large portion of it must be provided in the Budget.

The Budget is brought down as soon as may be after the close of the financial year, March 31, and is considered in Committee of Ways and Means. It contains a statement of revenue and expenditure for the past year, a balance sheet of estimated revenue and expenditure for the coming year, and proposals as to remission or increase of taxation. The accounts are kept on a strict annual basis, so that any sums not expended must be returned to the Exchequer, where they are used to reduce the debt. This no doubt encourages efforts to spend by departments near the end of the year, but any excess in this regard is checked by the rule that only to a limited extent can sums saved on one vote be transferred to another, a practice mainly allowed in the defence services, whose finance is in many respects unique.

Private Bills are to be distinguished from public Bills introduced by private members. They are measures affecting localities, persons or groups of persons, dealing with such topics as water, drainage, gas, electricity, railways, tramways, and harbours, estates, names, naturalization, &c. Such measures are initiated by petitions which must be lodged on 17 Dec., about two months before the beginning of the normal session, and which are carefully scrutinized by the Examiners of Private Bills to see if they comply

with the standing orders, which are intended to ensure that all parties conceivably interested in the proposal are given notice of it, and thus enabled to prepare opposition. If the orders have been complied with, the Bill is introduced in one House or the other, there being a fair division of the work. The presentation to either House is equivalent to a first reading; on second reading it may be, but not often is, opposed on principle; if passed, it goes to a Committee of four members, which hears witnesses and counsel and finally approves or rejects the measure. If approved, it must be read a third time in the House, and then accepted by the other House. In some cases a joint committee may examine measures. The procedure is deplorably expensive to those concerned, and it is often avoided by the procedure by Provisional Order. In that case under statutory authority a department investigates proposals for legislation and embodies them in a Provisional Order, which is then presented to the legislature scheduled to a Bill, and normally accepted without much discussion; if opposed, it goes to a Select Committee. In either case, there is one important gain from the mode of procedure; it relieves Parliament from excessive lobbying for local interests by persons desiring private legislation.

On prorogation it is not unusual to allow private Bills to be carried over until the next session or even a new Parliament; but this is contrary to the usage in the case of public Bills which are jettisoned, the government announcing some time before the end of the session the 'massacre of the innocents' in the shape of the Bills which they will no longer seek to pass. The waste of time involved is serious, but the persistence of governments in adopting the plan suggests that they find it convenient to have this excuse of not trying to pass Bills, which they have been driven to take up against their better judgement by pressure of

groups, while in other cases Bills are withdrawn to be redrafted in the light of the discussion in the House.

To secure the passage of business at all, it is necessary rigidly to limit discussion in certain cases. Thus the number of days allotted to supply is definitely fixed, the minimum being twenty, and only certain votes chosen by the opposition can receive any discussion, the remainder being voted on the last day without debate. The closure may be moved by any member during a debate and it is in the discretion of the Speaker or Chairman to accept the motion, and if carried the debate ceases. Another form of abbreviation is closure by compartments, definite time limits being laid down for the discussion of certain parts of a Bill (the guillotine), while under the 'Kangaroo' the Chairman in a debate in committee of the whole House is empowered to select such amendments as he deems fit for discussion, and a like power can be exercised on report.

Of the other functions of Parliament beside legislation and finance great importance attaches to questions, which may be asked at the beginning of each day's business. Questions must relate to public business with the administration of which the minister to whom they are addressed is concerned, must ask for information, must not deal with internal affairs of a Dominion or a foreign country, must not attack the Crown, judges, Dominion Governors, members of the Houses, &c. The Speaker may disallow any question, and the minister may decline to answer, but he may, if he pleases, reply also to supplementary questions. Answers in writing may be asked for in lieu of oral replies. In the Lords answers may be debated, but not in the Commons as a rule. A member, however, may move after Questions the adjournment of the House to discuss a matter of urgent public importance with the permission of the Speaker, and the support of at least forty members.

Permission is often refused, and the House may decline to discuss the issue.

While questions serve a very important function of control, criticism is also exercised more formally by debate. The King's speech elicits a reply, which gives the opportunity for amendments of the widest character arraigning all the defects of the government, and, when the opposition demands a day for the discussion of an important item of public business, the government will concede it. Beyond that there is abundant room for attacks in Committee of Supply, where in fact, in lieu of real examination of finance and control of extravagance, there is political assault on governmental weaknesses.[1] On the motion for the adjournment of the debate similar opportunity arises for such discussions.

In the House of Lords opportunities for debate are unlimited, though the House may decline to hear a noble lord on the very rare occasions when it loses its urbanity. The presiding officer has no power in the strict sense to regulate debate. The result of the freedom of action is to produce many most interesting discussions, and the value of the House as a place where high issues can be debated by experts in politics, defence matters, and administration is beyond question, foreign affairs or such issues as India or Malta in 1929–30 receiving more effective treatment there than in the Commons.

§ 4. *The Judicial Functions and Privileges of Parliament.*

Parliament enjoys a number of special privileges and exercises quasi-judicial functions, which are reminiscent of the time when it was closely connected with the King's Council and, like it, could be concerned with all manner

[1] The Liberal Governments of 1885 and 1895 fell on defeats in Committee; the Conservative of 1905 was seriously weakened.

of business.[1] The House of Lords in its judicial capacity is a descendant from this period, but under the modern constitution has become a law court pure and simple, and, therefore, falls to be dealt with as part of the judiciary. Impeachment by the Commons for trial by the Lords was long the appropriate remedy for high crimes and misdemeanours beyond the reach of the law, or which no other authority in the State dared to prosecute, but the maxims of responsible government have at present rendered this procedure obsolete. In like manner Bills of attainder and of pains and penalties, which were an alternative to impeachment, and in which the Commons took its usual part of equality with the Lords, have also passed away; the judicial character of even these proceedings is attested by the fact that the accused could defend themselves by counsel and adduce witnesses before both Houses. On the other hand, Parliament retains the right to order inquiry into public matters by select or special committees, such as that which investigated the administration of the army before Sebastopol in 1855. The difficulties in the way of such committees as regards obtaining satisfactory evidence from unwilling witnesses have been removed once and for all, and the necessity of special Acts avoided, by the Tribunals of Inquiry (Evidence) Act, 1921, under which, on a resolution by both Houses for the setting up of a tribunal to inquire into a definite matter of urgent public importance, then, if a tribunal is appointed by the Crown or a Secretary of State, in accordance with the wishes of Parliament, that body has the powers of the High Court regarding the obtaining of evidence, and the Court will punish for contempt recalcitrant witnesses. This is a con-

[1] In the Dominions like privileges have been granted by their constitutions or by statute. They do not belong to legislatures as such; *Kielley* v. *Carson* (1841–2), 4 Moo. P.C. 63; K. & L. p. 71 n.

venient procedure avoiding selection of the Committee by Parliament itself.

Both Houses have the right to determine their own composition, and the House of Lords in effect still exercises this right through its Committee of Privileges. This body is not bound by strict judicial procedure, and its decisions are neither wholly harmonious nor beyond dispute; they include the denial of the right of the Crown to create a life peerage by prerogative with the right to a seat in the Lords,[1] a disability slightly modified by statute in favour of the Lords of Appeal, and the ruling that peeresses in their own right are not qualified for seats in the Lords.[2] In the case of the Commons the retention of power to decide election petitions led to their being dealt with on a political base, Walpole resigning on defeat on such an issue, and a valuable remedy was the reference under an Act of 1868 of such issues to the determination of two judges selected without interference by the executive or legislature.

As already mentioned, private Bill procedure involves the Committee which considers each Bill in what is clearly judicial work, as is also the work of Select Committees on opposed Bills to confirm Provisional Orders. Costs may be awarded against the promoter of a private Bill in favour of the opponents.

The privileges claimed and asserted by the Commons and Lords are far more comprehensive than could be justified by the mere needs of orderly debate and command of procedure. They include freedom from arrest for forty days before and after a session of Parliament, but this privilege does not apply to cases of treason, felony, or breach of the peace, and in the case of Wilkes both Houses resolved that it had no application to criminal libel—despite

[1] (1856) 5 H.L. Cas. 958.
[2] *Lady Rhondda's Case*, [1922] 2 A.C. 339.

the contrary view of the Common Pleas,[1] nor does it apply to criminal contempt of court.[2] Freedom of speech has been secured by the reversal by the Lords on writ of error of the proceedings against Eliot in 1629[3] and by the Bill of Rights, 1689. The right of access to the King belongs to the House collectively, but to Privy Councillors and peers individually, though it is seldom exercised, and the Crown deals with any representations in accordance with ministerial advice. The House also enjoys the right of the most favourable construction being placed on its proceedings. In addition to these privileges, which are duly claimed by the Speaker at the commencement of each Parliament, the House claims power to determine issues of the legal qualifications of its members, apart from questions of controverted elections which it has handed over to the Courts. Thus in Michael Davitt's case, on account of his disqualification owing to being under sentence for felony, it declared the seat vacant, and a new writ was issued by the Speaker, whose function it is to issue writs for casual vacancies on the resolve of the House. The House may also expel a member for any reason it thinks fit, but it, as a result of Wilkes' case, has abandoned the claim to declare void the election of a person once expelled and to award the seat to his rival. It has so supreme a power to regulate its own proceedings that, even when a statute appears to empower the taking of an oath, if the House orders that a certain person, known to be an atheist, is not to be allowed to take the oath, the Court will refuse to interfere with the House, however incorrect its interpretation of statute may be.[4] It may refuse permission to publish its

[1] *Wilkes' Case* (1763), 19 St. Tr. 982.
[2] *Long Wellesley's Case* (1831), Commons Journals, lxxxvi. 701.
[3] (1666) 3 St. Tr. 294.
[4] *Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271; K. & L. p. 96.

debates, but this right is naturally now waived, and an official report issued. The obvious difficulty that reports of speeches made freely in Parliament may injure individuals there attacked without power of self-defence is partly met by the ruling in *Wason* v. *Walter*[1] that a fair report of proceedings, though incidentally containing matter disparaging an individual, is privileged, but not the report of a particular speech for the purpose of injuring any person. More generally protection is given by an Act of 1888 to fair and accurate reports of proceedings of public meetings published without malice for the public benefit. But this does not cover the issue that it may be in the public interest to publish a report *prima facie* libellous, and the decision of the House to do so brought about a serious conflict of opinion between the Courts and the House as to the nature and extent of the latter's powers in matters of privilege.

The view of the House, which had been asserted with great frequency during the period when it felt itself superior to the electorate and more than a match for the Crown, was that it was the sole judge of its privileges, that no court could decide any question involving directly or indirectly the extent of privilege, which if declared by a vote of the House bound all courts. The House further held that it had unfettered right to punish any person guilty of contempt by disobeying its orders, attacking its character, insulting its members, or frustrating the actions of its officers. The extent of the punishment was limited to imprisonment for the session, the practice of fining having long dropped. The Courts took a very different view of the power of the House to exclude them from deciding issues of privilege. In the early case, *Ashby* v. *White*,[2] the Lords on appeal ruled that the Courts could decide an

[1] (1868) L.R. 4 Q.B. 73; K. & L. p. 105. [2] (1703) 2 Ld. Raym. 938.

action for damages brought by an elector against a returning officer for not permitting him to vote, though the Commons asserted that this was a breach of privilege as dealing with an issue of a disputed election, and only prorogation stayed a dispute. Now in *Stockdale* v. *Hansard*[1] it was ruled that the order of the House to publish was no answer to an action for libel. The House declined to accept the judgement, and, when an effort was made to execute a further judgement against the printers, obtained in default of pleading, it committed for contempt the Sheriff of Middlesex.[2] It then turned out that the Courts could not help the Sheriff; they declined, following the decisions in earlier cases including *Burdett* v. *Abbot*,[3] which arose on a contempt consisting of an attack on Parliament, to interfere in the right of the House as of a superior court of law to decide for itself what was contempt. The issue was rendered unimportant by the Parliamentary Papers Act, 1840, which gives absolute protection to what is published by order of either House, but the right of the Courts to intervene, subject to the right of the House to treat such intervention as contempt, remains, though happily the matter is now largely of theoretic interest, as is the still undecided point whether, if a committal were not simply for contempt but for something which plainly was not possibly a contempt,[4] the Courts would hold their hands. Nor is it possible for the House, even if it so desired, to prevent a common informer suing for the penalties imposed for sitting and voting if under a disqualification, e.g. by holding a governmental contract. In such a case only an Act can excuse payment.

[1] (1839) 9 A. & E. 1; K. & L. p. 78.
[2] (1840) 11 A. & E. 273; K. & L. p. 92.
[3] (1817) 5 Dow, 199; (1811) 14 East, 1.
[4] *Paty's Case* (1704), 2 Ld. Raym. 1105, per Holt C.J., p. 1113; K. & L. p. 74.

The House enjoys the right to forbid the presence at any time of strangers, and very rarely in war-time use has been made of this power to hold a secret session, but the practice has few merits. Members can usually be excused service as sheriffs, but waive any claim to be excused giving testimony in ordinary cases. The Courts, on the other hand, will not require members to give, against their will, evidence as to proceedings in the House, nor will they entertain proceedings by a constituent against a member for refusing to present a petition.

The Lords have similar privileges to the Commons, but may record protests against measures if they think fit, and may commit for contempt for definite periods and fine. They have also the privilege of trial by their peers for treason or felony.

§ 6. *The Legislative Power.*

It is the characteristic of the Parliament that its legislative power is absolutely sovereign. The authority is virtually resident in the two Houses only, or in cases covered by the Parliament Act, 1911, in the House of Commons, for the royal assent has never been refused since Anne. It is true that conceivably it might be employed as a matter of law, and in fact it is on record that a threat to use it has been made to secure alterations being accepted in a private Bill; but it is very unlikely that ministers would ever be forced to advise refusal to a Bill which had passed both Houses, and still more unlikely that the King would ever be placed in such a position as to be compelled in the national interest to refuse assent.

The Courts have no power whatever to deny the validity of any Imperial Act. It is true that Coke declared[1] that the Courts could declare void Acts contrary to reason or

[1] *Bonham's Case* (1610), 8 Co. Rep. 114 a.

repugnant or impossible to be performed, that in *Hampden's* case[1] the view was expressed that an Act which purported to take away essential prerogatives was of no effect, and that in *Day* v. *Savadge*[2] it was ruled that 'even an Act of Parliament made against natural equity as to make a man judge in his own case is void in itself, for iura naturae sunt immutabilia and they are leges legum'. The doctrine was to be echoed by Otis and Adams in the conflict between the Crown in Parliament and the American colonies, but it was not to prevail, and, despite the repetition of the doctrine in *Day* v. *Savadge* by Holt C.J.,[3] the matter unquestionably stands as laid down by Willes J. in *Lee* v. *Bude and Torrington Junction Railway Co.*;[4] the proceedings in the Courts are judicial, not autocratic, and if the law is clearly expressed, whatever it says must be obeyed, however unsatisfactory it may seem. Exactly the same doctrine has been applied to Canada by the Privy Council; if a statute enacts what is practically impossible, nevertheless it is not for the Court to amend the law, which must be done by the legislature itself.

It has indeed been suggested on the strength of some careless or irrelevant dicta that no Act can violate international law. But what was meant, for instance by Lord Mansfield,[5] was simply that whatever Parliament might enact did not alter international law, which, of course, is perfectly true. The Act may violate that law but still must be applied by the Courts. Thus in Scotland, but on the same principles, it has been ruled that, if a statute penalizes fishing in the Moray Firth, the Act must be respected even as applied to a foreigner who pleads that

[1] 3 St. Tr. at pp. 1075, 1190, 1235.
[2] (1614) Hob. 87. Cf. Keith, *Const. Hist. of First Brit. Emp.*, p. 349 f.
[3] *City of London* v. *Wood* (1701), 12 Mod. at p. 687.
[4] (1871) L.R. 6 C.P. at p. 582.
[5] *Triquet* v. *Bath* (1764), 3 Burr. 1478.

the area is internationally open sea over which the Crown has no jurisdiction.[1] Any limitation must come from Parliament. Normally, of course, it is assumed that Parliament is legislating for the United Kingdom, but it is merely a matter of construction whether it is so limiting its field. It may legislate for any portion of British territory, for British subjects anywhere, for British protectorates and mandated territories, and even for foreigners,[2] though in the last case its legislation may well be contrary to international law, and in fact such legislation is almost unknown. British ships fall under its sphere as a normal matter. As regards overseas territories, parliamentary legislation is normal merely for constitutional issues; matters of international concern such as the carrying out of obligations as to control of armaments, foreign enlistment or extradition; matters requiring extra-territorial action such as rendition of fugitive criminals or removal of criminals, or air navigation; and issues of allegiance. In the case of the Dominions the Imperial Conference of 1926 recognized that Imperial legislation for them should only be by assent, and the Conference of 1930 held that such assent should be recited in each Act which legislated for them. The Irish Free State, while not denying the right thus to legislate, insists that all legislation for the State can emanate now solely from the State. Even now, however, the constitution of Canada can be altered in any essential solely by Imperial Act as also can the introductory clauses of the Commonwealth of Australia Constitution Act, 1900, as opposed to the constitution, which can be altered by local action. It is clear also that the secession of any part of the Empire requires Imperial legislation, for no part is

[1] *Mortensen* v. *Peters* (1906), 8 F. (Just. Cas.) 93; K. & L. p. 7. See Wheaton, *Int. Law* (ed. Keith), i. 18 f.

[2] *Cail* v. *Papayanni* (1863), 1 Moo. P.C. (N.S.) at p. 474; K. & L. p. 7.

able under its constitution to destroy the fact that it has only a derivative authority from King and Parliament.

The essential result of this sovereign power is that the constitution of the United Kingdom is absolutely flexible. Parliament cannot bind any successor, however much it may desire to do so. The Parliament Act, 1911, can be changed by a simple Act, and unquestionably the monarchical constitution could be legally abolished by an Act duly assented to by the sovereign. No Dominion possesses this plenitude of authority, still less other possessions. Hence all Dominion and other legislation of subordinate authorities, whether the British executive, or an overseas legislature, or local authorities, or companies with statutory powers of rule-making, is subject to the doctrine of *ultra vires*; it is always the duty of a court to examine whether the legislation is or is not contrary to legislation possessing a superior validity. In the colonies generally, and up to 1931 in the Dominions, all legislation is invalid which is repugnant to an Imperial Act, and the Courts regularly so judge. Legislation by the executive, as has been seen, is examined to see if it accords with the authority given, and not only is this the case as regards local authorities such as county councils and borough councils, and lesser by-law-making bodies, but their by-laws may be examined to see if they are reasonable. In the case of the by-laws of local bodies, reasonableness is normally presumed,[1] for it is not desired to interfere unduly with local autonomy or power to meet local needs, but the enactments of railway companies, for instance, are much more severely scrutinized.

A further characteristic of Imperial legislation is its exemption[2] from any judicial investigation as to the

[1] *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; K. & L. p. 25.

[2] The Courts will restrain a petition for a private Act or against one;

regularity of the formal passage. Even in the case of a private Bill, which ought to go through elaborate procedure in order to assure due rights of opposition to those injuriously affected, the Courts will not do more than satisfy themselves that the Bill has been accepted by both Houses and assented to.[1] Certainly they will not examine any question of the correct counting of votes or voting by persons unqualified, as it is alleged the Habeas Corpus Act passed the Lords by the unfair counting of the Lords in favour of it. Even if a Bill receives assent erroneously, as did one of two Eastern Counties Railway Bills in 1844, before it had passed the Lords, it is dubious if the Courts could treat it as invalid, and in fact legislation had to be passed to declare void the apparent assent.

While the judiciary must obey statutes, they must also interpret them, and this interpretation has now developed certain doctrines of constitutional importance, both as regards the position of the Crown and of the subject. Thus it is presumed that the Crown is not bound by any Act unless expressly named, or unless the Act would lack meaning if the Crown were exempt. Parliament, that is to say, must be assumed to legislate for the subject, not the sovereign. The driver of a motor lorry for the War Office has thus been held not to be liable to the speed limits,[2] and it has been necessary in recent legislation to make clear its application to the agents of the Crown. On the other hand, the vested interests of the subject to life, liberty, and property will be protected by assuming that an Act shall not be interpreted to work injustice, unless this cannot be helped.

Heathcote v. *North Staffordshire Ry.* (1850), 6 R. & C. Cases, 358; *Stockton &c. Ry. Co.* v. *Leeds &c. Cos.* (1848), 5 R. & C. Cases, 691. But, if leave has been given, it will not intervene; *A. G.* v. *Manchester &c. Ry. Co.* (1838), 1 R. & C. Cases, 436.

[1] *Edinburgh and Dalkeith Railway Co.* v. *Wauchope* (1842), 8 Cl. & F. at p. 723; K. & L. p. 8.

[2] *Cooper* v. *Hawkins*, [1904] 2 K.B. 164.

No Act will be assumed to contemplate the taking of property without compensation, even in case of war emergency, as was decided in the classical case of *Attorney-General* v. *De Keyser's Royal Hotel.*[1] The right to liberty must be taken away in express terms, as also the right to have access to the Courts.[2] Penal and taxing statutes are construed in a limited sense rather than expansively, and no retrospective effect will ever be given to statutes, if it can be avoided. Again, while Parliament has full power of constitutional change, it will not be assumed that such alteration can be effected by anything short of clear words; thus the effort to claim that, when women were admitted as graduates of the Scottish Universities, the term 'person' in the Representation of the People (Scotland) Act, 1868, was to be read as including female graduates was properly rejected,[3] though the Privy Council has by rather curious reasoning concluded that in Canada women are eligible for the Senate,[4] apparently because of the growth of the principle of female suffrage.

Interpretation, however, cannot be carried beyond reasonable limits. It is not accurate to say that Parliament cannot alter a decision of the Courts; it is not in fact usual to do so directly,[5] as by declaring that a decision was wrong, but a frequent duty of Parliament is to enact amendments of laws which in its view the Courts have interpreted contrary to their sense,[6] and it could, if it pleased, shut off

[1] [1920] A.C. 508; K. & L. p. 325.

[2] *Newcastle Breweries Ltd.* v. *R.*, [1920] 1 K.B. 854.

[3] *Nairn* v. *University of St. Andrews*, [1909] A.C. 147.

[4] *Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124.

[5] 16 Chas. I, c. 14, annulled the judgement in the case of ship-money, and five judges were imprisoned.

[6] s. 4 of the Trade Disputes Act, 1906, forbidding actions in tort against trade unions, was directed against the decision in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, which was widely criticized.

the possibility of applying to the Courts as regards the operation of any law. The Commonwealth Constitution, on the other hand, distinguishes judicial from legislative power, and assigns each its due place;[1] the British has no possibility of subordinating the legislature to the judiciary, and it reserves to the former the right to annul the rules of procedure which it permits the judiciary under statute to make to regulate its operations.

It must finally be noted that the enormous power of Parliament belongs in large measure to the Commons, for under the Parliament Act the most far-reaching legislation of any kind of a public character may be passed by the will of that House alone. There is one vital restriction. The Commons may completely alter the constitution or powers of, or even annihilate, the Lords by an Act passed under the procedure of the Parliament Act, but it may not extend in this way its own duration, and, if it purported to do so, the Crown could not legally assent, and, even if assent were given, the measure would not bind the people or the Courts. On the other hand, the passing of the Septennial Act in 1716 asserted the uncontrollable power of the two Houses with the assent of the Crown to extend the duration of Parliament and to deny the electors the possibility of expressing a verdict on the measures of the ministry against the Jacobites, and this precedent was followed in the war of 1914–18 to obviate an election during hostilities. There is, of course, a definite limit to the authority of Parliament, the fact that it must not go beyond the limits of the subject's obedience. But though menaced in 1914 by the movement in Ulster, when armed resistance[2] to the Home Rule Bill was planned, and by the General Strike of 1926, its authority has hitherto not been seriously undermined.

[1] *Shell Co. of Australia Ltd.* v. *Federal Commr. of Taxation* (1930), 47 T.L.R. 115.

[2] Parl. Papers, Cd. 7631.

V

THE JUDICIARY

§ 1. *The Courts of Law.*

THE Supreme Court of Judicature (Consolidation) Act, 1925, summing up the Judicature Acts, 1873–1910, and minor legislation, establishes as the High Court of Justice a body of judges divided into three divisions, the Chancery Division, with the Lord Chancellor as President, the King's Bench Division under the Lord Chief Justice, and the Probate, Divorce, and Admiralty Division under a President; the puisne judges are styled Justices of the High Court. The King's Bench Division embraces the work of the former Courts of King's Bench, Common Pleas, and the Exchequer, while the Chancery Division is concerned with matters of equity jurisdiction, though under the Act of 1873 the two systems of common law and equity are fused, and are administered side by side, certain rules of equity being given definite authority against the principles of common law. In addition to original jurisdiction absolutely unlimited, civil and criminal, the High Court is a court of appeal from inferior courts (county courts, quarter and petty sessions, and the Mayor's Court in London). From the High Court, subject to various restrictions, appeals lie to the Court of Appeal, which contains six permanent members, the Master of the Rolls and five Lords Justices, and the heads of the three divisions of the High Court, and the Lords of Appeal in Ordinary. A further appeal lies to the House of Lords as a judicial body. The right of the ordinary peer to play any part when the House is dealing with judicial affairs is by a convention of the constitution obsolete, and the House is made up of the Lord Chancellor, seven Lords of Appeal in Ordinary, who

are peers for life, and any other peers who have held high judicial office. In criminal matters the Court of Appeal is of recent origin, the High Court having formerly been of final authority. Under the Act of 1907 the Court of Criminal Appeal consists of the Lord Chief Justice and all the judges of King's Bench, three being a quorum. An appeal may be brought on a point of law without permission, on fact or fact and law, with permission of the Court or the trial judge, or on the ground of sentence, with the leave of the Court. The Court need not allow the appeal if satisfied that there has been no miscarriage of justice, though there has been irregularity, and on an appeal in respect of sentence it may increase as well as lessen the penalty; but its aim is to insist on a high standard of care in criminal proceedings, and it has undoubtedly done much to improve the administration of criminal justice. The Home Secretary can obtain its view on a case on his own initiative, even if the prisoner does not bring an appeal, or after an appeal.

In cases of treason or felony, peers and their wives have the right to trial by their peers, and the privilege cannot be waived. The House for this purpose is presided over by the Lord High Steward appointed under the Great Seal,[1] while, if the House is not in session, the trial takes place in the Court of the Lord High Steward. In this case the peers act as jury.

The central courts naturally cannot deal with the great mass of litigation. Commissions of assize, including commissions of gaol delivery and oyer and terminer, 'to hear and decide' the cases of prisoners indicted, are issued to High Court judges or King's Counsel to visit the eight Assize Districts, and decide civil and criminal cases, while there is for London the Central Criminal Court with full jurisdiction.

[1] *Earl Russell's Case*, [1901] A.C. 446.

For criminal cases below a certain standard of seriousness, jurisdiction is exercised by quarter sessions, in which justices of the peace sit, or by borough quarter sessions presided over by a paid recorder, a trained officer. Petty criminal cases are dealt with at petty sessions by two justices or by individual justices, while in the towns the same functions are exercised by stipendiary magistrates, and by police magistrates in London. Appeal lies to quarter sessions, or in certain cases the High Court. Civil jurisdiction belongs to the county courts, which exercise also a limited Admiralty and Bankruptcy jurisdiction, to some minor courts, and to the Mayor's and City of London Court; the old palatinates of Durham and Lancaster survive in the Chancery Courts in these areas, whence appeal lies to the Court of Appeal. The Coroner is required to investigate, normally with the aid of a jury, of from seven to eleven persons, all cases of suspicious death and matters of treasure trove, and on the verdict of his inquest any person may be committed for trial, though normally the usual procedure in criminal matters is also followed.[1] Under it there is a preliminary investigation before a magistrate or justices, who decide whether or not there is sufficient of a *prima facie* case to commit for trial, usually to quarter sessions or assizes; there a grand jury by a vote of twelve members determines whether or not trial shall take place, ignoring the bill if it thinks there is no *prima facie* justification for prosecution; if it finds a true bill, the prisoner is tried by a petty jury. Juries now may include women, the qualification is low, and the lists have been based since 1922 on the parliamentary register. Objections to their employment have

[1] An Act of 1926 allows adjournment, where a charge has been brought of murder, or manslaughter, until after the proceedings terminate, renders juries optional in minor cases, and requires viewing of the body only when the Coroner thinks it necessary. Coroners are elected by county or borough councils and may be removed by the Lord Chancellor.

not prevailed against the feeling that they serve the purpose of asserting the rights of the subject against governmental injustice. Since *Bushell's* case[1] in 1670 they have been exempt from punishment for returning a verdict contrary to the evidence in the judge's eyes, and, by refusing to indict Shaftesbury in 1681, the grand jury established its right to override the wishes of the Crown, a precedent not rarely followed, especially in cases of alleged criminal libel.

In civil cases juries[2] can be had at the desire of the parties in common law actions; they are not used in Chancery cases. A majority decision of the twelve jurors may be accepted of consent; otherwise, if unanimity is unattainable, there must be a new trial. In criminal cases if a juror falls ill or dies, the verdict may be delivered by the others, not being less than ten, if the parties agree. It must be unanimous. If this is impossible, there is normally a second trial later.

Scotland, with its own common law, blended of feudal and Roman elements, has its own judicial system, presided over by the Court of Session for civil work, and the High Court of Justiciary for criminal cases. But a wide civil and criminal jurisdiction rests with the Sheriffs-Substitute, subject to appeal to Sheriffs-Principal, and thence to the Courts above. A Criminal Court of Appeal has now been added to the traditional system, while civil appeals lie to the House of Lords, which usurped jurisdiction in this matter as in the question of Scottish peerage claims.

For ecclesiastical appeals, which are now extremely rare, as the Church makes little use of its courts, and for prize

[1] 6 St. Tr. 999.

[2] In certain cases special juries of persons with higher property qualifications may be had on payment. In Scotland majority verdicts prevail, and in criminal cases a verdict of 'not proven' is allowed, which means acquittal.

appeals from the courts set up by the prerogative in war-time throughout the Empire, the final Court is the Judicial Committee of the Privy Council, which consists of the Lord President, who does not normally sit, the Lord Chancellor, the seven Lords of Appeal in Ordinary, and any judge who has been a member of the High Court and is a Privy Councillor, while the Dominions are represented by judges of their superior courts who are Privy Councillors, and India by two paid judges, and two other lawyers may be added, as was Lord Oxford. The essential function of this body is to hear appeals from the Channel Islands, the Isle of Man, all overseas courts (Dominion, colonial, protectorate, and mandated territories), and consular courts abroad, and from India. As a rule two forms of appeal exist; under Order in Council authorized by the Imperial Act of 1844, or local Act, an appeal lies as of right when certain conditions as to value (often £500) are fulfilled, or by special leave, which may be granted by the Court below, or failing such grant by the Privy Council itself. On an application for leave to appeal, the Council may at the same time determine the issue, but usually that is done later. The decision of the Court is unanimous in appearance, as it takes the form of advice to the sovereign, which is given effect by a formal Order in Council determining the case. The Council will not act as a Court of Criminal Appeal, and will intervene only where there has been a grave departure from the forms of legal process, or a grave violation of natural justice, as when a judge overlooks the possibility that an alleged accident may not have been murder, but may have been merely manslaughter, and pronounces the crime murder.[1] To the Committee the Crown may refer any matter for an opinion, and this is done in the case of such a boundary dispute as that between

[1] *Knowles* v. *The King* (1930), 46 T.L.R. 276; [1930] A.C. 366.

Canada and Newfoundland over Labrador,[1] or the issue between the two Irelands,[2] or the question of the interpretation of Article X of the Irish Treaty of 1921 as to compensation to displaced officials.[3] The ideal of an Imperial Court of Appeal[4] to hear appeals from every court was raised by Mr. Joseph Chamberlain in 1900–1, and has often since been debated, and in view of the possibility of the Dominions using the power conceded by the Conference of 1926 to abolish the appeal, the issue was once more taken up in 1930. Opinion in English legal circles has always deprecated any change from the House of Lords, and Dominion national feeling, as well as considerations of expense and celerity, militate against an overseas appeal, which is chiefly valued where, as in Canada, there are racial issues and religious divisions, or, as in India, these matters coexist with a belief that the central judicature is more favourable to liberty than the local courts.

§ 2. *The Functions of the Judiciary.*

The main purpose of the judiciary is to apply and enforce the law, and for that purpose security of tenure is essential as regards the judges of higher rank, who, therefore, are by the Act of Settlement made to hold during good behaviour though liable to be removed by the Crown on addresses from the two Houses of Parliament. Inferior judges hold at pleasure, but it is contrary to practice to remove them without full consideration, and they are unquestionably not subject to executive pressure. Hence the Courts, despite appointment by the executive, now serve as a protection to the subject against deliberate or careless abuse of authority.

[1] *In re Labrador Boundary* (1927), 43 T.L.R. 289.

[2] Parl. Papers, Cmd. 2214.

[3] [1929] A.C. 242.

[4] The Privy Council and the Lords are not bound by the judgements of each other. Cf. Keith, *Responsible Government*, ii. 1104 f.

The judiciary, in interpreting statutes, is clearly bound to observe closely the terms of the Acts. Formerly, when Acts were drafted in wide and inaccurate terms, it was natural that judges should attempt to remedy errors as they thought, either by excepting cases out of the Act or by equitable construction, bringing under it cases to which its wording did not apply. Room for this has now disappeared, and judges refuse also to take into account the history of legislative Acts as shown in the records of Parliament, nor will they permit themselves to be guided by the policy of an Act in interpreting its provisions. If, of course, the Act is ambiguous, there is more latitude to consider the cause and necessity of the Act, to compare its various provisions, and to take into account extraneous circumstances which may throw light on the wording. But the real activity of judicial action is seen in the development of the common law. It is, in fact, the creation of the early judges, who, from a mass of uncertain and varying customs, managed to evolve a moderately coherent system. In the fourteenth century, judges admitted that in effect they were making law, in the fifteenth it was claimed that the class legislation of Parliament was corrected by the national legislation of the judges, Coke asserted that the common law could effect reforms denied by Parliament, and in the eighteenth century Mansfield made very remarkable efforts to bring into being new doctrines of law. The process has never since ceased. The common law is living and has power of expansion to meet new cases. Much of the statute law, for instance, the Sale of Goods Act, 1893, is not more than a codification of common law. On the other hand, unlike the legislature, the Courts cannot depart from a decision once finally arrived at by the highest court, the House of Lords.[1] While the Judicial Committee of the Privy

[1] *London Street Tramways Co. Ltd.* v. *London County Council*, [1898] A.C. 375.

Council[1] can alter its mind on better information, a decision by the Lords, though it has come to be deemed erroneous, must stand, even if it merely rests on the fact that the judgement of the Court below had to be accepted because the Lords were equally divided.[2]

A further activity of importance, though one much less developed than might have been wished, is the power to decline to enforce contractual and other conditions on the score that they are counter to public policy. Such matters cover agreements tending to injure the State in its international or domestic relations; to injure the public service; to pervert the course of justice; to endanger the security of marriage or the exercise of parental authority; or to restrain trade. Two currents of judicial opinion can be traced on these topics, the one seeking not to extend the conception and to adhere to established classes of cases, the other prepared to meet new emergencies and to use the power for the public good. On the whole, the former view has prevailed, despite the wider doctrine accepted by the House of Lords in *Egerton* v. *Earl Brownlow*[3], when it declined to give effect to a condition in a will requiring a beneficiary to attain a higher title. But the power to extend is not dead. A newspaper cannot be bound by an agreement not to comment on a financial business if it normally does so, for then it may mislead its readers.[4] No aid will be given by the Courts to those who agree to smuggle liquor into the United States despite the prohibition law.[5] But monopolies to the disadvantage of the public have escaped the application of the doctrine, though they are a serious restraint of trade. But a contract will be

[1] *In re Irish Civil Servants* (1929), 98 L.J.P.C. 39; [1929] A.C. 242.
[2] *R.* v. *Millis* (1844), 10 Cl. & F. 534.
[3] (1853) 4 H.L.C. 1.
[4] *Neville* v. *Dominion of Canada News Co. Ltd.*, [1915] 3 K.B. 556.
[5] *Foster* v. *Driscoll*, [1929] 1 K.B. 470.

adjudged void, if it entails trading with the enemy, and the doctrine is used to prevent unfair restrictions being imposed on employees allegedly to prevent subsequent competition with their employers.

Note has already been taken of the services of the judiciary in interpreting, so as to secure justice to the subject, the legislative activities of governmental departments. Another side of this beneficent work is the use of the prerogative writs in order to control the operations of judicial, or quasi-judicial, or ministerial officers or bodies. The growth of this procedure has been much strengthened by the fact that local administration and jurisdiction were so largely from the first in the hands of the justices of the peace, who were under no obligation to take orders from governmental departments, but who could be controlled by the Courts. The writ of prohibition forbids a body acting judicially to proceed in excess of its jurisdiction or in violation of law. It has been addressed to Light Railway Commissioners and the Comptroller General of Patents, but denied against the Attorney-General in respect of his function of deciding appeals in patent matters.[1] It has been granted against the Electricity Commissioners[2] in respect of the preparation of a scheme for the incorporation of joint electricity authorities, which affected the interests of private companies. Prohibition was there granted, though the order of the Commissioners required confirmation by the Minister of Transport for its effect. *Certiorari* requires the transmission of the proceedings of any judicial or quasi-judicial body to the superior court in order that any irregularity may be amended. Thus in the *Board of Education* v. *Rice*[3] it was ruled that the Board, which was

[1] *In re Van Gelder's Patent* (1888), 6 R.P.C. 22.
[2] *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171; K. & L. p. 187.
[3] [1911] A.C. 179.

empowered to decide certain issues between managers of schools and local education authorities, had failed to deal with the matter at issue in its decision, and that a *mandamus* must issue to it to perform its function. It will be seen that the Court did not attempt to decide the issue itself; its purpose is to cause the appropriate authority to do its duty. The writ has also been issued against the Local Government Board, but it has been refused against the order of the Home Secretary[1] for the deportation of an alien, on the score that his action was executive and not judicial, so that it could not be claimed that he must hold an inquiry before he acted. This is in keeping with the doctrine that the Courts are unwilling to attempt to control the higher officers of State as opposed to the less important Boards which less directly stand for the Crown. Nor will prohibition or *certiorari* issue to deal with a government department in respect of a provisional order made under statutory power which must be confirmed by Parliament.[2] But it has been held that, if a town improvement scheme is not in accordance with an Act, an order made by the Minister of Health in apparent confirmation of the scheme can be quashed by *certiorari*, despite the fact that it is provided in the Act that 'the scheme when made shall have effect as if enacted in this Act'.[3]

Mandamus lies to ministerial officers to require them to perform duties which they owe to members of the public, but will be granted only if no equally efficacious remedy exists, as for instance a claim in tort against the negligent officer. It will not be used against judicial or quasi-judicial officers in the sense of interfering with their dis-

[1] *Ex parte Venicoff*, [1920] 3 K.B. 72; K. & L. p. 138.
[2] *R.* v. *Hastings Local Board* (1865), 6 B. & S. 401.
[3] *R.* v. *Minister of Health, Ex parte Yaffé* (1930), 46 T.L.R. 373; [1930] 2 K.B. 98.

cretion, but it is available to require them to deal with a case, to use their discretion and carry out their decisions.[1] But it will not lie against the Crown, or a minister who closely represents the Crown,[2] as opposed to such a Board as that of Education. In precisely the same way in the Dominions a *mandamus* does not lie against a Governor.[3] It has been refused against the Secretary of State for India and the Treasury, and it never lies where a duty is merely owed to the Crown and not the subject.[4]

The Courts exercise a rather feeble restraint over voluntary associations and vocational organizations which now play a large part in regulating men's interests. Such bodies are largely autonomous, possessing the right to refuse admission and to expel, or fine, or as in the case of benefit societies to withhold benefits. In some cases such bodies possess wide legal powers of an important character as is the case with the General Council of Medical Education, which by its right to remove a doctor's name from the register can prevent him from giving a death certificate and practically from the exercise of his profession.[5] The Courts, however, merely insist that the right to expel or penalize must be exercised by the duly constituted authority of the association, that the accused must be allowed to be heard and to present fully his defence with full knowledge of the charge against him, and that the members of the tribunal must be free from bias. Thanks to these rules, members of clubs or trade unions have been held to have been wrongfully expelled,[6] and the Institute

[1] *R.* v. *Boteler* (1864), 4 B. & S. 959; K. & L. p. 198.

[2] *R.* v. *Lords Commissioners of Treasury* (1872), L.R. 7 Q.B. 387.

[3] *The King* v. *Governor of South Australia*, 4 Commonwealth Law Reports, 1497.

[4] *R.* v. *Secretary of State for War*, [1891] 2 Q.B. 326.

[5] *R.* v. *General Medical Council, Ex parte Kynaston*, [1930] 1 K.B. 562.

[6] *Lamberton* v. *Thorpe* (1929), 45 T.L.R. 420; *Maclean* v. *Workers' Union*, [1929] 1 Ch. 602.

of Patent Agents has been required not to show bias,[1] but on the whole the principles do little for the member affected. An appeal to a court of law would seem demanded, and it is significant that where lawyers are concerned they have secured it. The Law Society now has the power to enforce discipline and remove from the rolls, after a legal form of investigation, but an appeal lies to the High Court, though naturally it is loath to reverse a decision of the Society. It is hardly fair that it should lie with the Stock Exchange to refuse to renew a member's inclusion simply because of alien connexions.

In all these cases the judiciary acts only in respect of actions which have taken place. It has, however, a certain jurisdiction to make binding declarations of right whether any consequential relief can be claimed or not. But this power does not extend to making declarations on hypothetical questions, and the effort[2] made in connexion with the land taxation of 1910 to secure judgements which would anticipate and prevent executive action was, though temporarily successful, rather objectionable in principle, and has not been followed up. Advisory opinions are, in fact, contrary to British practice. They are common only in Canada, where the constitution presents so many ambiguities that efforts are made both in the provinces and the Dominion to elicit judicial views on knotty points,[3] and a similar power could be exercised by the Privy Council with regard to Northern Ireland on the request of that government. On appeal from Canada that body also endeavours to aid, but it has often laid down the rule that such opinions are not binding if a concrete case arises,

[1] *Law* v. *Chartered Institute of Patent Agents*, [1919] 2 Ch. 276.

[2] *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; K. & L. p. 265.

[3] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A.C. 571; K. & L. p. 444.

and that in the absence of the exact facts it is really impossible as a rule to advise usefully. A brilliant example of the futility of such opinions is seen in that of the Supreme Court of Canada in 1929 on the issue of provincial and Dominion rights as to the control of the St. Lawrence.

Other functions of the Courts are quasi-executive; thus they administer trusts, wind up companies, distribute bankrupt estates, and issue titles of right—decrees creating, transferring, or extinguishing rights, such as adjudications in bankruptcy or decrees of divorce. Definitely legislative is the function of making under statute rules of procedure which is vested in general in the Rules Committee, composed of the Lord Chancellor, Lord Chief Justice, Master of the Rolls, President of the Probate, Divorce, and Admiralty Division, four judges nominated by the Lord Chancellor, two practising barristers, and two practising solicitors. Such rules may be annulled by Order in Council on address from either House before which they must be laid. Other rules may be made by the Lord Chancellor or the President of the Probate Division.

Judicial immunity from suit is justified in the public interest, despite occasional instances of hardship to suitors. A judge who in vacation refuses to issue a writ of *habeas corpus* may be sued for a penalty of £500, but otherwise all judges, superior and inferior, are immune from criminal and civil liability for acts done within their jurisdicton, even when malice is alleged. Superior judges are assumed to act within their jurisdiction in every case, and so are wholly immune.[1] Other judges are immune even if they act without their jurisdiction, if they are led to exercise jurisdiction by false allegations of fact which, if true, would have given jurisdiction.[2] But, if a mistake of law induces

[1] *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668; K. & L. p. 168.
[2] *Houlden* v. *Smith* (1850), 14 Q.B. at p. 851.

exercise of jurisdiction, that is no excuse. Witnesses, parties, and counsel are given absolute immunity in respect of words used by them in judicial proceedings (save of course where perjury is committed). Justices of the peace, when acting purely judicially, have the same exemption as inferior judges;[1] in other capacities they are liable for acts done within their jurisdiction on proof of malice and absence of reasonable and probable cause, and for all acts done without their jurisdiction, provided that the order or conviction is first reversed or quashed. To all public authorities a certain measure of protection is afforded by the Public Authorities Protection Act, 1893, which compels any action[2] to be brought within six months from the injury inflicted, gives the defendant the costs as between solicitor and client if he succeeds, and secures him the right to make a tender of amends. There is no doubt that grave injustice may be inflicted by the limitation of time.[3]

[1] *Law* v. *Llewellyn*, [1906] 1 K.B. 487.

[2] This does not apply to *certiorari* proceedings; *R.* v. *London County Council, Ex parte Swan & Edgar* (1929), 45 T.L.R. 512.

[3] *Freeborn* v. *Leeming*, [1926] 1 K.B. 160.

VI

THE STATUS AND RIGHTS OF THE SUBJECT

§ 1. *British Nationality and Allegiance.*

THE feudal tie between the subject and the King was that of allegiance, which the Treason Act, 1495, declares to be due to the King *de facto* whatever his claim *de iure*. It is due to the King in his natural no less than in his regal capacity, as held in *Despencers'* case.[1] Allegiance is due from all British subjects, but also from all aliens present (otherwise than as invading enemies) on British territory, and thus an alien whose country is at war with the Crown, but who is not part of the enemy forces of invasion, is guilty of treason if he aids the enemy, as much as is a subject. An alien invader whose country is at peace with the Crown is equally guilty of treason, for when on British territory he owes a local allegiance. Nor is it any defence that the British Crown had temporarily withdrawn its protection *de facto* owing to enemy occupation of territory.[2]

The British Nationality and Status of Aliens Acts, 1914–22,[3] confer the status of natural-born British subjects on all persons born on British territory other than children of invaders, and on the children of British subjects when born out of British territory on certain conditions. These demand that the father should either have been born on British territory or in a place where the Crown exercises extraterritorial jurisdiction, as in Egypt; or have been naturalized; or have become a British subject by annexation of territory; or have been in the service of the Crown

[1] (1320) 1 St. Tr. 23.
[2] *De Jager* v. *A. G. of Natal*, [1907] A.C. 326; K. & L. p. 291.
[3] Dicey and Keith, *Conflict of Laws* (1927), pp. 156–202.

abroad. It also suffices that the child's birth be registered at a British consulate, if within a year after age 21 he makes a formal declaration of retention of British nationality, and, if permitted by the law of any country of which by birth he became a subject, renounces that nationality. This provides for the retention of British nationality in places like Turkey, or the South American Republics, with settled British colonies proud of their nationality. Birth on board a British ship even in foreign territorial waters confers British nationality, but not birth on board a foreign ship in British territorial waters. Naturalization[1] depends on the grant of the Home Secretary, and is conditional on the alien having been resident in the United Kingdom for one year preceding his application and for four years, out of the last eight, having resided on British territory. Knowledge of English and good character are essential, and intention to reside on British territory, but service of the Crown may be counted as equivalent to residence. Naturalization so granted, at the absolute discretion of the Crown, is valid throughout the Empire in virtue of reciprocal legislation by the Dominions, whose government similarly can grant naturalization valid throughout the Empire, knowledge of French in Canada or Dutch in South Africa being accepted as well as that of English. The Dominions and colonies may also grant local naturalization which has no validity outside the territory concerned, such people being aliens in the United Kingdom.[2]

A British subject loses his nationality by becoming naturalized abroad. If by birth he has more than one nationality he may at majority or later rid himself of

[1] A naturalized person is in the same position as a natural-born British subject and can be made a Privy Councillor; *R.* v. *Speyer*, [1916] 2 K.B. 858.

[2] *Markwald* v. *A. G.*, [1920] 1 Ch. 348; *R.* v. *Francis, Ex parte Markwald*, [1918] 1 K.B. 617; K. & L. p. 287 n.

British nationality by making a declaration of alienage, but none of these things can be done during war so as to entitle the person concerned to exemption from the obligation of the law of treason or liability to military service.[1] A married woman normally has the nationality of her husband, but, if she is British and her husband after marriage changes his nationality, she can retain British nationality, and if having married an alien, his country becomes at war with the Crown, she may be given a certificate of naturalization. Infant children can be included in the certificate of naturalization granted to an alien, and normally, when a British subject becomes an alien, his children cease to be British subjects. Wide powers of revoking certificates of naturalization are vested in the Home Secretary and in Dominion governments.

Aliens are accorded practically the same rights as British subjects other than political rights or the right to own a British ship. But an alien has no absolute right of admission to the United Kingdom,[2] and may be deported thence, if criminal, by statute.[3]

British nationality does not confer of itself any rights outside the United Kingdom which cannot be regulated by local law. The Acts, which largely reaffirm common law and early statutory doctrines, decide authoritatively who is a British subject, but the rights of such subjects depend on the law of the place, and it is expressly recognized that the Acts in no wise affect the right of any territory to treat differentially different classes of British subjects. Hence there is no bar on the exclusion of British

[1] *R.* v. *Lynch*, [1903] 1 K.B. 444; K. & L. p. 289; *Gschwind* v. *Huntington*, [1918] 2 K.B. 420.

[2] *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272; the rule applies to the Dominions.

[3] Also in the Dominions; *A. G. for Canada* v. *Cain and Gilhula*, [1906] A.C. 542.

Indian immigrants from the Dominions, or the imposition of disabilities on them or on the native races resident therein. Aliens, of course, are equally liable to differential treatment, save in so far as this is contrary to treaty, and in practice the entry of aliens is seriously restricted in the Dominions, the limitations imposed on Italian entry having elicited strong feeling in that country, while the exclusion of Japanese virtually from all the Dominions, with a slight exception in the case of Canada, and of Chinese from all, is a fact of great political importance.

§ 2. *The Liberties of the Subject.*

For various historical causes there is unquestionably a definite tendency in the British constitution to secure as far as possible by judicial action the existence of a substantial amount of personal liberty.[1] The extent of this desire varies from time to time. Undoubtedly at the present day the objection to any restriction on freedom of expression of religious or social or economic views is most marked. On the other hand, there is a remarkable readiness in the interest of material welfare to contract individual option, as may be seen from restrictions on hours of work.

Such protection as is enjoyed by the individual in the United Kingdom rests on the operation of the ordinary law of the land, and is not enacted by any constitutional code. The value of such enactment is clearly minimal. The Irish Free State embodies in the continental fashion the most excellent doctrines in its constitution, but, as it permits ordinary legislation to affect them all, it is not surprising that the State has seen the enactment of the most repressive law against political opponents known in

[1] *Entick* v. *Carrington* (1765), 19 St. Tr. 1030; K. & L. p. 145; *Sommersett's Case* (1772), 20 St. Tr. 1.

modern British law, and now enjoys a severe censorship of literature.

The rule of law in the United Kingdom and in the oversea territories, which have accepted it, means essentially that all restrictions on human liberty rest on legislation or common law, which is judicially interpreted by independent judges, so that there is the least possible room for the exercise of discrimination by the executive. The law administered may, of course, be in itself harsh and unfair, as were the laws against dissent; but the English system compels the law to be plainly stated, thus facilitating movements for its reform, and largely obviates the use of power for indirect ends. It is true that there can never be complete achievement of the elimination of executive discretion. The right to open letters in the post and withhold them, which appertains to the Home Secretary, is a dangerous inroad on liberty, but, though occasionally discussed, the Commons has never felt able to disapprove it even in time of peace, and its necessity in war is obvious. A large amount of discretion lies in the bringing of prosecutions by the police for offences, e.g. against the Acts as to motoring; the refusal of admission and deportation of aliens, and the withdrawal of certificates of naturalization, are matters in which the Home Secretary acts without laying down any principles for public information, or giving any explanation in any case. But public opinion as shown in the Savidge case[1] is very sensitive as to apparent police interference, and it is now probably true that the limits on police interrogation of witnesses imposed as the result of the inquiry into that case have distinctly hampered that force in carrying out its duty. Moreover, liberty profits by the rule of law that the accused in a criminal

[1] See the Report of the Commission on Police Powers and Procedure, 1929, Parl. Papers, Cmd. 3297.

case is entitled to exemption from any pressure to answer questions, and must be warned that he is not obliged to answer any inquiries, and that what he says will be taken down and may be used against him. Nor even since the Criminal Evidence Act, 1898, can he be compelled, though he is competent, to give evidence at his trial, and the prosecution may not comment on his failure to do so. On the whole it seems clear that unfair pressure is seldom applied by police officers, and never by the courts, a tradition followed in the Dominions, though the difficulties of controlling police are said in India to diminish the effective protection of the prisoner.

The procedure available for the protection of personal liberty was greatly strengthened by the Habeas Corpus Act, 1679. That Act provides that, where any person is detained on the pretext of a criminal charge, other than treason or felony plainly expressed in the warrant of commitment to prison, an application may be made on his behalf to the Lord Chancellor, or any judge,[1] whether in vacation or term, for the writ directing the officer who has the person in custody to bring him before the Court. The judge must discharge the prisoner with or without bail, unless his imprisonment proves to be lawful and unbailable. The Bill of Rights, 1689, forbade excessive bail, and an Act of 1816 extended the remedy to cases of confinement other than arrest or imprisonment on a criminal charge. There are, of course, various possible grounds which prevent discharge besides arrest or imprisonment under the criminal law. Detention may be warranted by commitment for contempt of court, or by order of a house of Parliament because of breach of privilege, or on the score of military or naval law, or of being a prisoner of war,

[1] Each judge of the High Court may be successively applied to; *Eshugbayi Eleko* v. *Nigerian Government*, [1928] A.C. 459.

or a lunatic or infant; but a husband has ceased to be able to imprison his wife. Where it is not desired to proceed against a political offender criminally or process might fail, detention may have to be provided by legislative Act, as was the case with the detention of the Egyptian patriot Zaghlul in Gibraltar,[1] or of Napoleon at St. Helena. Instances of such detention are chiefly familiar from practice of late in India thus to deal with earnest fanatics such as Mr. Gandhi. In the war of 1914–18, while no general suspension of the Habeas Corpus Act was ever contemplated, wide powers of internment of dangerous persons were conferred on the executive.[2]

The right of freedom of speech and discussion by writing or printing is not as directly protected as that of personal liberty. It rests essentially on the fact that no licence is required either to speak or print, and that, therefore, every man is free to express himself, subject to the rule that he is liable to penalties if he defames another, or his expressions are seditious, blasphemous, or indecent. Defamation gives rise to an action for damages on the part of the person defamed, or, if the defamation is such as to be likely to cause a breach of the peace, to a criminal prosecution, in which not only must the accused prove the truth of his statements —which is a sufficient defence in a civil suit—but also that publication of them was for the public benefit. It must, however, be remembered that many publications are privileged, either absolutely, or subject to the qualification that the privilege is lost if the publisher is actuated by malice, and the leave of a judge is always needed for a criminal prosecution for libel against a newspaper. No doubt the statutory relief granted to the press to publish

[1] *In re Zaghlul Pasha*, 67 S.J. 382 (Gibraltar Ordinance). For Napoleon see 56 Geo. III, c. 22.

[2] *R.* v. *Halliday, Ex parte Zadig*, [1917] A.C. 260; K. & L. p. 13.

defamatory statements made at public meetings, &c., creates some risk of unfairness to the individual, but on the whole the system is for the public advantage.

Sedition in its widest sense might be used as a means of exercising a wide control on publication of attacks on the government, but such a result is obviated by public opinion, and by the right of a jury since Fox's Act of 1792 to return a general verdict, negativing Lord Mansfield's attempts to limit the jury to the mere issue of publication, leaving the judges to decide what was seditious libel. Blasphemy again has been reduced by judicial exposition[1] to the grave offence of vilification of the Christian religion, and criticism in accordance with the decencies of language is fully allowed. It must be remembered that offensive blasphemy in public places is apt to create breaches of the peace and to cause grave difficulties to the police.

The right of public meeting is equally without specific recognition in law. Men may meet but they must not trespass, nor interfere with the right of passengers to use roads. They must not meet to commit a breach of the peace or a crime, nor in such a manner as to cause reasonable people to fear a breach of the peace.[2] If they do, the assembly becomes unlawful, and it is the right and duty of magistrates and others to disperse it. Moreover, if a proclamation under the Riot Act, 1715, is made, any twelve persons remaining together an hour thereafter become guilty of felony. But if men gather lawfully for a lawful end, it is not criminal on their part that opponents of their view commit breaches of the peace. The Salvation Army cannot be made to cease its work because the Skele-

[1] *Reg.* v. *Ramsay and Foote* (1883), 48 L.T. 733; *Bowman* v. *Secular Society*, [1917] A.C. 406.

[2] *Charge to the Bristol Grand Jury* (1832), 5 C. & P. 261; K. & L. p. 359.

ton Army tries to break up its meetings.[1] But if the end is lawful but the means involve slanderous attacks on Roman Catholics in Liverpool where feeling runs high, an assembly may be unlawful or at least its leaders may be bound over to keep the peace if there is just apprehension of the occurrence of a breach of the peace.[2] If, moreover, a breach of a peace occurs, an assembly perfectly lawful in itself may be required to disperse in case of emergency, but the duty of the police is primarily to deal with those responsible for the breach. A warning by an official that an assembly is unlawful does not make it so, but it will render it difficult for any persons who take part in it to escape responsibility if in fact it does become unlawful. If the police disperse a lawful assembly, it is clear that resistance must be confined to self-defence,[3] and the true remedy is an action for damages. For the growing practice of making political meetings useless by organized rowdyism an ineffective remedy is provided in the Public Meeting Act, 1908, which makes disorderly conduct at a public meeting punishable by fine or imprisonment.

We have already seen that the individual is protected from arbitrary taxation by the fact that the executive is wholly subjected to the legislature and the Courts. Similarly an attempt to extend the general terms of the customs legislation to enable the government to exclude foreign dyestuffs, without asking for specific legislation, was defeated by the Courts[4] on the instigation of Sir John Simon with disastrous results to the British Dyestuffs Corporation, which had acted on belief in governmental assurances that such stuffs would not be imported. Impressment

[1] *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308; K. & L. p. 354.
[2] *Wise* v. *Dunning*, [1902] 1 K.B. 167; K. & L. p. 357.
[3] *Reg.* v. *Ernest Jones*, 6 St. Tr. (N.S.) 783, 811.
[4] *Attorney-General* v. *Brown*, [1920] 1 K.B. 773.

for the army is absolutely illegal, and for the navy is obsolete.

The right to petition the sovereign, which formerly was of real importance as a mode of bringing to royal attention the grievances of the subject, has ceased to have much constitutional interest. It is still resorted to in order to impress on the government of the day the public demand for such things as the abolition of capital punishment. But it is still law that a petition to the King must be submitted by the Home Secretary though the answer to be returned depends, of course, entirely on that officer's advice.

VII

THE CHURCH

§ 1. *The Church of England.*

THE Church of England is by law established and forms an essential part of the structure of the State. The fundamental tenets which must be accepted by clergy are prescribed by the Clerical Subscription Act, 1865, and are based on the Thirty-nine Articles of Religion drawn up by a Convocation of clergy in 1562, while the services of the Church are in theory and to a great extent in practice governed by the Book of Common Prayer in accordance with the Act of Uniformity of Charles II, as slightly modified in 1872. Important changes involving the admission of certain doctrines regarded as of doubtful consonance with the character of the Church were matured in 1927 and presented to Parliament, but both then and in 1928, when a revised Prayer Book was submitted to Parliament, the Commons rejected the proposals. In some cases they are being acted on with episcopal acquiescence, an action which has raised once more the issue of the continuance of the connexion between State and Church.

England is divided into two provinces, Canterbury and York, under Archbishops, of whom that of Canterbury is Primate of All England. Each province is divided into dioceses under bishops, and these into archdeaconries, deaneries, and parishes. The Archbishops and bishops are appointed in fact by the King on the nomination of the Prime Minister, and, as has been seen, the Archbishops and twenty-four bishops sit in the Lords, but have not the privilege of trial by their peers. The deans of cathedrals are also royal appointees, and a considerable number of benefices are in royal hands. All clergymen must be in

holy orders conferred by the bishop, are ineligible for Parliament, and are under some minor disabilities. Holy orders can now be renounced.

Legislative authority over the Church was, prior to 1919, exercised in two ways. Parliament could, of course, legislate, as it still can, on any matter ecclesiastical, but legislation was and is possible through the instrumentality of the Convocations for Canterbury and York. These bodies meet under royal authority conveyed by Order in Council to the Lord Chancellor directing the issue of writs to the Archbishops. They are composed of the Archbishop, bishops, archdeacons, deans, and one proctor for each Cathedral Chapter, and two clergy for each diocese, or in York archdeaconry. To alter the canons of the Church a letter of business and a royal licence are requisite, and any canon enacted must be approved by letters patent. It then binds the clergy, but must be enacted by Parliament to bind the laity. It is not surprising that this procedure was deemed ineffective for purposes of legislation, and in 1919 the Church of England Assembly (Powers) Act was passed which, with doubtful propriety, invents a remarkable plan of legislation. Measures which are intended to receive the royal assent and to have the force of an Act of Parliament, repealing or altering existing legislation, may be passed by the Assembly which is organized as three Houses, of Bishops, of Clergy, and of Laymen. Each measure is then presented by a Legislative Committee appointed by the Assembly, and representing the three houses, to the Ecclesiastical Committee of Parliament which is composed of fifteen peers chosen by the Lord Chancellor and fifteen members of the Commons chosen by the Speaker for each Parliament. The Ecclesiastical Committee considers the measure, in conference if need be with the Legislative Committee, and reports to Parliament on the nature and

legal effect of the measure and its expediency, especially with reference to the constitutional rights of all his Majesty's subjects, provided that the Legislative Committee decides that it wishes the matter to proceed. Then the Houses may approve by resolution the presentation of the measure for the royal assent, in which case it becomes an act of legislation of full force. It is plain that this procedure is calculated to oust parliamentary control and to minimize the national character of the Church, and it is significant that it was in this way that the revised Prayer books came to be presented for the consideration of Parliament. It is curious that the resistance came not from the Lords, who might have been expected to resent the innovations, but from the Commons. The legislation thus passed has been rather extensive, and it may thus be possible ultimately to supersede the operation of the provision by statute [1] for the control of irregularities in the Church, the operation of which has practically ceased.[2]

The Irish Church, which under the Act of Union was part of the English Church, was disestablished in 1869, and is now an autonomous church, and the same fate overtook in 1920, under an Act of 1914 postponed in operation through the war, the Church in Wales. The Church in Wales is now entirely disestablished and autonomous, and its governing body in 1922 expressly provided that the Courts of the Church should not be bound by decisions of the English Courts, or of the Judicial Committee of the Privy Council, in relation to matters of faith, discipline, and ceremonial. The Episcopal

[1] The Church Discipline Act, 1840; the Public Worship Regulation Act, 1874; the Clergy Discipline Act, 1892.

[2] The Assembly and the Legislative Committee do not act judicially so as to be subject to control by King's Bench by prohibition or *certiorari; R.* v. *Legislative Committee of the Church Assembly and Church Assembly*, [1928] 1 K.B. 411.

Church of Scotland is likewise an autonomous church which by its constitution cannot be united with the Church of England. Such union would, of course, run counter to the fact that in Scotland there is an established Church whose position is predominant.

In the colonies also the churches which follow generally the Anglican model are usually autonomous and not branches in any legal sense of the Church of England. This result was only gradually achieved, for at first it was contemplated that bishoprics with jurisdiction should be established in the colonies, and such appointments were made in Canada, Australia, New Zealand, and South Africa, as well as in the West Indies and in India, in the latter case under statute. But it was established in the case of the disputes[1] between Bishop Colenso in Natal and the metropolitan in the Cape of Good Hope that the ecclesiastical law of England was not in force as part of English law introduced into a colony, and that it could be made effective only by legislative methods. Hence the plan of giving jurisdiction was abandoned, and in Canada the provision made for the endowment of rectories of the Church of England after many years of discussion was finally abolished in 1854 by Parliament in Canada with compensation to incumbents. In India also an autonomous church has at last replaced the official church with the sanction of an Imperial Act of 1927. These churches are, of course, in full communion with the Church of England, and by the Lambeth Conferences are kept in consultative touch with it; but the essential fact is that it rests with themselves to decide how far they shall accept the changes which from time to time are adopted in creed, ritual, or mode of government by that Church, and there is no

[1] *In re Lord Bishop of Natal* (1864–5), 3 Moo. P.C. (N.S.) 115; K. & L. p. 278; Keith, *Responsible Government*, ii. 1125–32.

connexion whatever between them and the Judicial Committee of the Privy Council. Their legal relations in all matters relating to property necessarily fall under the control of the Courts of the places in which they function exactly as in the case of every other church, and they obtain legislation or incorporation as they require for purposes of property, while the rights of their clergy and members are governed by agreement and the constitution of the Church as duly established from time to time by its synods.

It is only in some cases of Crown Colonies as in the West Indies, the Eastern Colonies, and West Africa, that bishops of the Church of England exercise spiritual as opposed to coercive jurisdiction on the basis of the principles of the Church of England, supplemented by authority over clergy given by local legislation or agreement.

In England the Ecclesiastical Courts, Consistorial and Provincial, of the Bishops and Archbishops, rank as courts of the land as opposed to the domestic tribunals of the other churches, and they will be aided by the Law Courts in exercising their jurisdiction,[1] while prohibition may be issued against them if they exceed it,[2] and appeal lies to the Privy Council.[3]

§ 2. *The Church of Scotland.*

The established Church in Scotland is provided for in the Act of Union which provides that the Presbyterian government of the Church of Scotland, by kirk sessions, presbyteries, provincial synods, and general assemblies, being the form ratified and confirmed in the first year of

[1] *Bishop of Lichfield* v. *Lambert* (1929), 46 T.L.R. 24.

[2] *Rex* v. *North, Ex parte Oakey*, [1927] 1 K.B. 491. For an order in Chancery for a bishop to admit a person duly nominated to a perpetual curacy, see *Notley* v. *Bishop of Birmingham* (1930), 46 T.L.R. 347; 47 T.L.R. 257.

[3] *St. Nicholas Acons* v. *London County Council*, [1928] A.C. 469; *Wakeford* v. *Bishop of Lincoln*, [1921] 1 A.C. 813.

William and Mary, shall be unalterable and the preservation of the Church of England and that of Scotland is made an essential condition of the Union. Unhappily this promise was broken in 1711 by Anne's Tory government which re-established in flat defiance of the promise the system of lay patronage of benefices, and the outcome of this grave breach of faith was a disruption in the Church in 1843 which was only healed in 1929 when the Free Church of Scotland returned to the fold, bringing with it the United Presbyterian Church to which it had been united in 1900. The way for reunion was paved by an Act of 1921 which granted in the fullest measure autonomy and power of change of creed in all but the essential fact of Trinitarian Christianity and Protestantism, and by a further Act of 1925 which definitely converted the teinds, which form a substantial portion of the Church endowment, into charges on land definitely ascertained and incapable of increase and vested the property of the Church in General Trustees. By this measure the objections to State endowment of the United Free Church were appeased, perhaps illogically, and the great majority of its members and clergy accepted reunion. The Church, though established by law, is completely autonomous and can by domestic legislation vary any Act of Parliament dealing with its property or religious observances. Its Courts, like those of the Church of England, are recognized by the civil law,[1] and aid is given in carrying out as regards property its findings.

§ 3. *Other Churches.*

In the United Kingdom all other churches are without official establishment; they are voluntary associations which in some cases have regulated their proceedings by

[1] *Ferguson* v. *Earl of Kinnoul* (1842), 9 Cl. & F. at p. 311; K. & L. p. 185.

obtaining Acts of Parliament as private legislation determining their constitution and the control of their property. They are subject to the control of the Courts in the ordinary manner. This is also the position of all churches in the oversea territories,[1] except that in Quebec and Malta the Roman Catholic Church may fairly be held to be the established and endowed Church. In both these territories the dues of the Church are collected under process of law from Roman Catholics, and the Courts under legislation give effect to the rulings of the authorities of the Church on matters ecclesiastical. The claims of the Church to intervene in matters of political concern have been carried far in Canada, but further in Malta, where in 1930 it was found necessary to suspend responsible government for a time owing to the orders given by the Bishops of Malta and Gozo with the sanction of the Pope forbidding voters under pain of committing mortal sin to vote for the Prime Minister at the ensuing general election, which, accordingly, could not be held. Previously the government of Malta, with the assent of the Imperial government, had suggested to the Vatican the conclusion of a concordat, calculated to assure that the clergy of Malta should be men loyal to the British Crown and that the Church as such should not engage actively in political ends. The issue was complicated by the fact that the clergy supported by the Vatican were adherents to the Italian faction in the island, which was anxious, if not for union with Italy, at any rate for the domination of the Italian language and Italian culture, as opposed to Lord Strickland's patronage of English and Maltese.

[1] Including the Roman Catholic Church in the Irish Free State; *O'Callaghan* v. *O'Sullivan*, [1925] 1 I.R. 90.

VIII

NORTHERN IRELAND, THE CHANNEL ISLANDS, AND THE ISLE OF MAN

THESE territories, closely connected physically with the United Kingdom, occupy different relations to it. Northern Ireland, which is the creation of the Government of Ireland Act, 1920, is an integral part of the United Kingdom but enjoys for many local purposes responsible government. The Channel Islands and the Isle of Man are parts of the British Islands, not of the United Kingdom. They are, however, under the legislative supremacy of the Imperial Parliament, which, however, seldom legislates save on matters of international interest or issues such as air navigation and shipping for the former.

Northern Ireland enjoys responsible government by a Governor aided by a Cabinet and a legislature of two Houses, the Senate of twenty-six members, two Mayors and twenty-four elected by the Commons on proportional voting for eight years, half retiring each four years, and the Commons of double the number now elected by simple majority voting as in England. The duration of Parliament is five years. Its legislative power is entirely subject to that of the Imperial Parliament, but extends to all local matters, excluding the Crown; peace and war, defence forces; treaties; titles; naturalization, aliens and domicile; foreign trade; navigation and quarantine; submarine cables; wireless telegraphy; aerial navigation; lighthouses; coinages, legal tender; trade marks, designs, copyrights, and patents. The endowment of religion is forbidden, as is differentiation in education or otherwise on religious grounds. Customs duties, excise, profits duties, and, save

to a limited extent, income tax are excluded from parliamentary control, and, in lieu, arrangements are made for a determination of the Irish share in these revenues and a contribution to Imperial expenditure on a basis very generous to Ireland. Control of Irish legislation is exercised through the right to instruct the Governor to refuse assent, or to reserve Bills. The Lower House is given predominance over the Upper by control of finance, and by the provision of joint sessions in case of the repeated failure of the Upper to pass a measure desired by the Lower House. The law is English as modified by legislation; a High Court is supervised by a Court of Appeal whence lies a final appeal to the House of Lords, but constitutional issues may be referred for a binding declaration to the Privy Council.

The Channel Islands are the remnants of the Duchy of Normandy, and by royal concessions enjoy extensive local government and exclusion from the general system of taxation, including freedom from Imperial income tax and customs. The claim occasionally suggested that they are exempt from the legislation of Parliament was emphatically negatived by Order in Council of 7 May 1806, and has never been acted on. But the right to legislate by Order in Council is uncertain,[1] for in 1853 the Privy Council revoked an Order made to remedy judicial defects in Jersey, and accepted in lieu some rather inferior local legislation, and in 1894 it revoked an Order as to the Jersey Prison Board when protested against, but in both cases it refused to declare definitely whether the Orders were valid without the assent of the local legislatures, the States. But the executive government and the power of pardon are in royal control and the Lieutenant-Governor as his repre-

[1] *In re the States of Jersey* (1853), 9 Moo. P.C. 185; 8 St. Tr. (N.S.) 285; *In re Daniel* (1891), ibid., 314; Keith, *Const. Hist. of First Brit. Emp.*, p. 382 f.

sentative can expel aliens. Further the writs of Habeas Corpus, Mandamus, Certiorari, and prohibition run to the islands, and they are subject to the ecclesiastical jurisdiction of the Bishop of Winchester.

The Crown is represented by Lieutenant-Governors in Jersey and Guernsey with military and civil powers, subject to the War and Home Offices. Legislation in Jersey rests with the States composed of the bailiff, who is the head of the Royal Court and a royal nominee; twelve constables elected one for each parish triennially; twelve jurats elected for life; twelve rectors nominated by the Crown for life, and fourteen members elected for three years, the electors including women. Provisional ordinances of the nature of by-laws may be made for three years without the assent of the Crown in Council, which is necessary for all permanent laws. In every case the Lieutenant-Governor may withhold assent, or the bailiff dissent, in which case the assent of the Crown in Council is necessary. Taxation normally needs royal confirmation, and the Crown controls the hereditary revenues. The States of Guernsey are of a similar nature, but the Royal Court there possesses also the right to make ordinances and to suggest legislation to the States. Alderney has also States, but the States of Guernsey may legislate for Alderney and from the Royal Court of Alderney appeal lies first to the Court of Guernsey. Sark has a Court, but is subject to Guernsey legislation and to its Court. From the Royal Courts of Jersey and Guernsey, composed of the bailiff and jurats, appeal lies to the Privy Council. The law administered rests on the ancient custom of Normandy as modified by local usages, Imperial and local legislation.

The Isle of Man, formerly held by grantees of the Crown in a state of all but complete independence, was surrendered on purchase in 1765 under the authority of an Imperial

Act. It retains its constitution, the Crown being represented by a Lieutenant-Governor, who legislates with the aid of his Council comprising the Bishop, two deemsters, two members nominated by the Lieutenant-Governor, and four elected by the House of Keys, and of that body composed of twenty-four members elected on a low franchise for seven years. Full control of customs rests with the Imperial government; after defraying the expenses of government and of an Imperial contribution, the rest of the revenue is at the disposal of the legislature. The laws are based in part on Norse custom, and from the Staff of Government, the highest court of appeal, appeal lies to the Privy Council. The assent of the King in Council is requisite for all legislation, and, as in the case of Northern Ireland, Imperial control rests with the Home Secretary.

IX

THE DOMINIONS

§ 1. *The British Commonwealth of Nations.*

IT is now usual to group the self-governing Dominions together with the United Kingdom, or inaccurately Great Britain, as the British Commonwealth of Nations, thus constituting a distinct portion within the larger conception of British Empire. The basis of the grouping is the possession of certain characteristics stated as follows by the Imperial Conference of 1926: 'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations.' The Conference statement was carried further by the detailed recommendations of an Imperial Conference of 1929 on Dominion Legislation and Merchant Shipping, which laid down the relations in internal matters which must mark the status of autonomy. Its proposals were approved in principle by the Imperial Conference of 1930,[1] and are to be given effect by a Statute of Westminster to operate from 1 December 1931.

Autonomy demands that the legislation of the Dominions shall be completed on the authority of their own Parliaments in which the Governor-General must act without interference by the Imperial government on the same lines as does the King in the United Kingdom. Legislation, therefore, must not be subject to any right of the Crown to instruct the Governor-General to reserve or refuse assent,

[1] Parl. Papers, Cmd. 3479 and 3717. See Keith, *Journal of Comparative Legislation*, xii. 279 ff.; xiii. pt. i. 24 ff.

and each Parliament which has the power to alter its constitution may eliminate the right to reserve, while the Imperial Parliament will eliminate that right on the request of any Dominion (Canada and possibly New Zealand) which has not the right. Precisely the same rule applies to disallowance; it is for the Dominions by the methods indicated to rid themselves of the possibility of disallowance. The question, it must be noted, is in a sense a mere change of form. Disallowance may fairly be said to be obsolete as regards the Dominions, and, though reservation of merchant-shipping legislation was necessary, it had of late years been found possible to accord assent. But it is clear that the existence of the power to reserve, even if rarely exercised, did constitute a real check on the freedom of Dominion legislation, and that therefore the decision of the Conference of 1929, formally confirmed by the Imperial Conference of 1930, does mark a real increase of autonomy.

Further the Conference approved the abolition of the doctrine of the supremacy of Imperial legislation in its application to the Dominions, and the repeal of the Colonial Laws Validity Act, 1865, under which any colonial act is invalid to the extent to which it is repugnant to any Imperial Act or regulation made under, and having the validity of, such an Act. This is a far-reaching innovation in point of form, for the assertion of Imperial supremacy, made in 1766 as a challenge to the repudiation of that supremacy by the American Colonies, was renewed in 1922 in respect of the Irish Free State. The Conference, however, recognized that there must be exceptions to this recommendation, for, as matters stand, the constitution of Canada rests on an Imperial Act which gives no power of essential change to the Parliament of the Dominion. This rule rests on the fact that the Dominion is a federal com-

pact which cannot properly be varied by legislation by the federal Parliament without provincial assent, and accordingly the supremacy of the British North America Act, 1867, must remain unimpaired. Similarly, while the Commonwealth of Australia Constitution of 1900 contains full scope for its amendment by the Parliament of the Commonwealth with the assent of the people at a referendum, it must remain supreme unless and until altered, nor is the constitutional power of the Parliament of New Zealand, the extent of which is at present uncertain, to be increased. No difficulty arises regarding the Union of South Africa which has full powers of constitutional change, nor the Irish Free State where constitutional change is limited only by the terms of the treaty of 6 December 1921, which is the supreme law of the Irish Free State according to its own constitution, and which cannot be overridden by that constitution.

It is not proposed that the Imperial Parliament should cease to be able to legislate for the Dominions,[1] but it must do so only with the assent of a Dominion and that assent must be recited in the Act legislating for any Dominion. The power of the Imperial Parliament to legislate on the succession to the throne or the royal title is admitted, but subject to the rule that any changes require the assent of the Parliaments of the Dominions also. A crucial difficulty is raised by this provision, for in the Irish Free State it is regarded as striking at the right of secession by the action of a Dominion Parliament, while it was accepted by the two Houses in the Union of South Africa on the understanding that the right of secession by unilateral action remained. It is contemplated that on so vital an issue as naturalization there shall be concurrent legislation in the

[1] No means exist in fact to limit the sovereignty of Parliament. English Courts must obey any Act.

Imperial Parliament and the Dominion Parliaments. There is, of course, little change of substance in these decisions, for Imperial legislation for the Dominions has long been confined to cases in which the legislation was desired by the Dominion governments and Parliaments.

Further, the territorial limitation of Dominion legislation is to disappear entirely. The extent of that limitation is uncertain, but the leading case of *Macleod* v. *Attorney-General for New South Wales*[1] has certainly drawn a discrimination, which is recognized as valid in the Dominion Courts, between the powers of the Imperial Parliament to legislate for matters happening outside the United Kingdom, and the inability of Dominion Parliaments so to enact, except under express Imperial authority, such as is conferred on the Commonwealth in respect of British ships, whose first port of clearance and whose port of destination are in the Commonwealth, or, generally on all Dominions and colonies, in respect of their military and air forces when outside territorial limits, and in respect of Dominion naval forces.

The removal of these restrictions renders it possible to remove all fetters on the uncontrolled exercise by the Dominions of legislative power over merchant shipping, abrogating the existing rules under the Merchant Shipping Act, 1894, which confine control to ships registered in the Dominions or engaged in their coasting trade. There are, it is clear, serious objections to the control of British shipping by the United Kingdom and every Dominion at which a ship may put in, and it is hoped to overcome them by agreements for action on like lines, a rather optimistic outlook.

One interesting relic of subordination must remain.

[1] [1891] A.C. 455; K. & L. p. 411. Cf. *P. & O. Steam Navigation Co.* v. *Kingston*, [1903] A.C. 471; Keith, *Responsible Government*, i. 321–38.

The Dominions have borrowed money freely in the United Kingdom on the strength of the admission of their securities to the rank of trustee stocks, and this has been accorded on the condition that any legislation varying the terms or security of the loan might properly be disallowed. This right will remain, though it might have been more useful to have replaced it by an agreement for arbitration in any case of dispute. That such matters may arise of disagreement between the parts of the Commonwealth under the régime of autonomy is recognized, and the setting up of a tribunal to settle disputes of a justiciable character has been recommended for consideration, the suggestion being that the tribunal should be constituted ad hoc of five members, all nationals of the governments of the Commonwealth. Such issues have arisen in the past, as in the case of the illegal deportation of British subjects from South Africa in 1914, or the failure of the Commonwealth to carry into effect the present emigration agreement on the faith of which large advances have been made from Imperial funds.

The Conference recommendations leave it open to the Dominions to rid themselves of the appeal to the Privy Council save, perhaps, in the case of Canada where such action would apparently be unconstitutional, and of the Irish Free State.

The limits of the recommendations are important. They apply to the federal Parliaments of Canada and the Commonwealth, but not to the provinces or the States; to New Zealand, the Union of South Africa, and the Irish Free State, but not to Newfoundland. Further extension to the excluded cases is, of course, possible.

While the slow process of Imperial and local legislation is needed to effect the carrying out of these principles of formal autonomy, the principle is now complete. The

vital matter yet obscure is whether any Dominion may by unilateral declaration of its Parliament secede from the Commonwealth. The right conflicts with the Irish treaty; with the expressed purposes of the Dominion constitutions which contemplate rule under the Crown of the United Kingdom; and with the apparent intention of the Conferences of 1926 and 1930. Nor on general grounds can it be deemed possible that separation could ever be effected without legislation by at least the United Kingdom and the Dominion concerned, or on the view of General Smuts of all the Dominions. The issue is not wholly academic in view of feeling in South Africa and the Irish Free State.

In external affairs the reality of autonomy is apparently already complete in the fact that the Dominions are members of the League of Nations as distinct units, and that Canada and the Irish Free State have secured seats on the Council by election, and it is hoped that a non-permanent seat may thus always fall to a British Dominion, side by side with the permanent seat which is held by the British Empire, and which is in fact filled by a nominee of the Imperial government. The Dominion representatives at Assembly meetings do not concert action with the British and not rarely vote in different ways, and the same fact is noted at meetings of the Labour Organization central authority. On the other hand, in matters falling outside the control of the League, such as relations with other States and treaty-making, and the control of war and peace, there is a measure of unity preserved both in form and fact. The power to declare war or make peace, or conclude treaties, or receive and accredit diplomatic envoys, is not conceded to any Dominion Governor-General and rests only with the King. The Dominions have an unquestioned right by agreement with the British government to establish their representatives in such

foreign countries as are willing to receive them and to send envoys in exchange. Thus Canada is represented at Washington, Tokio, and Paris; the Union of South Africa at The Hague, Washington, and Rome; and the Irish Free State at Washington, Paris, Berlin, and the Vatican. Further appointments are contemplated. But in all cases the envoys are accredited by and to the King, and in accrediting envoys the King must act, since he intervenes personally, on the final responsibility of a British minister,' the Foreign Secretary. Moreover, in the notes arranging for representation it is stated that it is not intended that it should interfere with the diplomatic unity of the Empire. Similarly the full powers to conclude a treaty and instruments of ratification are signed by the King on the final authority of the Foreign Secretary; without his intervention it would be impossible under the Great Seal Act, 1884, to pass these instruments under that Seal. This intermediate step gives the Imperial government the opportunity, if it desires, to secure that no treaty is made which injuriously affects the interests of any other part of the Empire without that part being given the opportunity of consultation. Such consultation is expressly provided for as necessary in every case of treaty-making by any part of the Empire by the Imperial Conference Resolutions of 1926, so that any real probability of serious friction should be removed. It may be hoped that no part of the Empire will deliberately desire to injure any other. Some treaties again, e.g. as to limitation of naval armaments, must be accepted by the whole of the Empire. War again, if declared by the King, must affect the whole Empire, and there is no authority for General Hertzog's belief in the possibility of neutrality for the Dominions in a British war. But the existence of the Treaty for the Renunciation of War of 1928 greatly reduces, when taken in conjunction with the Cove-

nant of the League of Nations and the Locarno Pact, any probability of isolated action. In the main, for the present the Imperial government conducts most of the foreign business of the Dominions, for the Commonwealth and New Zealand have not established any diplomatic representatives of their own, and the representation of the other Dominions is limited by their preference to make use of the facilities provided gratis by the British government. The consular representation of the Dominions is likewise in embryo, and British consuls are normally employed.

The Conference of 1930 enunciated the doctrine, in connexion with the question of the appointment of the Governor-General, that His Majesty would act on the advice of the Dominion ministry and that the channel of communication between the King and the ministry was a matter concerning them only. If applied to foreign affairs, this doctrine would eliminate in theory Imperial ministerial intervention, but in practice the King would feel bound to consult informally British ministers on Dominion recommendations inimical to Empire interests, nor could he accept advice in the face of British objections on a vital issue. To secure full independence the Dominions would require a delegation of all royal prerogatives to the Governors-General in addition to the selection of these officers. The ineluctable fact is that the common allegiance and the King's presence in England impose restrictions, for which compensation exists in the field of economics, finance, and above all, defence.

In the main the responsibility for defence is still left to the United Kingdom. Canada, protected by the aegis of the Monroe doctrine, has a merely nominal naval force and small military forces; the Commonwealth fleet has been reduced in size and cost, and the system of compulsory training has been dropped by the Labour govern-

ment of 1929; New Zealand has a small naval force and has decided in 1930 to dispense with compulsory training at least in large measure; the Union eschews maritime defence on score of cost, and in the belief that the British navy in any case must look after the trade routes, but has an efficient military force to keep in control the native races, and the Irish Free State at present has made no arrangement for coastal defence, though it has a military force adequate for internal order, but not prepared to resist foreign aggression. The position of all these territories is explicable only on the assumption of the continued effective protection of the United Kingdom, a fact which, in view of possibilities of oriental menace, explains the reluctance of the Commonwealth and New Zealand to press for fuller autonomy.

An outcome of the development of Dominion autonomy is the tendency to create a Dominion nationality. In Canada in 1910 Canadian citizens were defined for the purpose of the Immigration Act only, and in 1921, in view of the membership of Canada of the organization of the Permanent Court of International Justice at The Hague under the League of Nations, Canadian nationals were defined as opposed to the wider category of British nationals, so that it might be possible for a Canadian to be elected a judge to sit while a British judge was a member. Nationality is given to persons born in Canada or domiciled there, their wives and children, and in 1927 the Union of South Africa made similar provision. In both cases no difference as to the franchise exists between British nationals and Dominion nationals. The Irish Free State, however, ascribes political rights only to its citizens, persons born in Ireland or children of such persons or ordinarily resident for seven years, if domiciled there on 6 December, 1922, an obscure and inadequate definition.

The relations between the parts of the Empire are, in the view of the British Government which was in effect accepted by all the Dominions in 1926, not such as exist under international law between distinct States. The Irish Free State earlier contended that this was not the case and that registration with the Secretariat of the League of Nations was compulsory under the Covenant for the validity of the treaty of 1921 with the United Kingdom. It renewed this view in a sense in 1929 when it acceded unconditionally to the Optional Clause of the Statute of the Permanent Court of International Justice, not excluding from the scope of compulsory jurisdiction inter-imperial disputes. But the other Dominions concurred with the United Kingdom in excluding such disputes, though the Union apparently did so not on legal grounds, but because it was deemed undesirable to submit inter-imperial issues to the Court. It may be added that, if such issues included that of immigration of Indians into the Dominions, they might find scant sympathy from the Court.

§ 2. *Responsible Government in the Dominions.*

It is impossible here to go into the details of responsible government as applied to the Dominions. Essentially the British system has been applied. The administration rests with the ministry under the Governor-General,[1] and it is responsible to the majority in the Lower House in the

[1] The Conference of 1930 conceded to the Ministry in each Dominion sole right to advise the Crown on the selection of the Governor-General, and Sir Isaac Isaacs was then appointed Governor-General of the Commonwealth. The opposition protested, on the score that an impartial person was requisite to fulfil the function of the Crown under the constitution, a view widely held in Canada, New Zealand, and the Union. The formal appointment is made under the royal sign manual and signet necessitating the formal intervention of the Secretary of State and his technical responsibility. Tenure of office is normally for five years, but is subject to the pleasure of the Crown which now would be advised by the local ministry, a position of much delicacy.

British way. The Governor-General is the repository together with his government of the prerogative of the Crown in so far as it is necessary for Dominion government. The only prerogatives of which there seems to be no delegation by implication or express terms are the very high sovereign rights of receiving and accrediting diplomatic agents, making treaties, declaring war and peace, conferring titles of honour, and coinage, the last matter being now regularly statutory throughout the Empire. Credentials of envoys sent to the Dominions are, however, presented to the Governor-General as the representative of the Crown. In his attitude towards ministers the Governor-General long preserved a measure of freedom beyond that of the Crown in the United Kingdom. In theory he was bound to obey instructions from the Imperial government if they conflicted with Dominion wishes, and by practice he was allowed to exercise a discretion as to accepting ministerial advice, especially in the case of a request for a dissolution, if he believed he could find other ministers to accept responsibility for his refusal and to carry on the government. But Lord Byng's action in 1926 in Canada, when he refused a dissolution to Mr. Mackenzie King and then was forced to grant one to Mr. Meighen, who found himself helpless in face of a hostile Commons, led to reconsideration of the position by the Imperial Conference of 1926 in consequence of the defeat of Mr. Meighen at the polls. It was decided, therefore, to stress the fact that the Governor-General should hold the same position towards his government as the King in the United Kingdom, and in accordance with that view a dissolution was duly granted in 1929 to Mr. Bruce in Australia. Similarly it may now be assumed that the Governors-General are bound to exercise the prerogative of mercy in accordance with ministerial wishes. The new rule does not apply in terms to Governors

of the States or Lieutenant-Governors of the provinces, though it is applicable to Newfoundland, but no doubt it will tend to be observed.

The Cabinets of the Dominions rest on the usual principles of solidarity under the Prime Minister, who is selected by the Governor, and the Executive (or in Canada Privy) Council normally coincides with the Cabinet, though in a purely honorary sense ex-members in some Dominions and States remain members not under summons. In the Irish Free State a definite effort is made to establish on a legal basis the rules of responsible government. Not only must ministers be members of the legislature, but they are elected by the Dail Eireann, the Lower House, and they cannot advise the Governor-General to dissolve Parliament after they have ceased to command the confidence of the Parliament. Normally in the Dominions any ministry may recommend, after defeat, a dissolution, and it is usually given. Nor is it customary to seek to enforce the rules of responsible government by law. The chief rule is simply that by law in the recent constitutions, such as those of Australia and South Africa, ministers must be or become in a specified time members of the legislature. It is customary also to give the power to appoint and dismiss officers to the Governor in Council, leaving to him personally only the appointment and removal of ministers, and to ascribe many powers to the Governor in Council. But this is unimportant, for the constitutional law requires in any case action on ministerial advice, whether the power is given to the Governor in Council or not, and whether it rests on local or Imperial legislation.

The legislatures of the Dominions are all bicameral as are those of the States, save Queensland, but only Quebec of the Provinces preserves a Legislative Council. Those of

Canada, Quebec, New Zealand, and Newfoundland are nominee, the others elective,[1] save that in the Union there are thirty-two elective and eight nominee Senators. Differentiation is effected in the States of Australia by a different franchise as well as longer duration, in the Commonwealth the Senate is based on equal representation of the States by six members apiece, three of whom are elected triennially by the whole State as an area, while the four provinces in the Union elect Senators by the votes of the members of the provincial councils and of the members of the Lower House for the province. Efforts to solve deadlocks have as yet yielded no satisfactory results, but in the Union the practice of joint sessions of the two Houses ensures without serious delay the predominance of the wishes of the Lower House, except in cases where, as in connexion with the abolition of the Cape native vote, a majority of two-thirds is needed for constitutional change.

Constitutional change is given to all the Parliaments save that of Canada, which can amend only minor details of the British North America Acts and cannot touch the distribution of authority.[2] In the Commonwealth change rests with the Parliament followed by a referendum, at which there must be a majority of votes and also a majority in four States; if the Houses disagree, the referendum may still be ordered, so that the people are given the chance to decide. It is significant that the Labour government in 1930 announced and carried through the Lower House a Bill to give the Parliament unfettered power of change, thus enabling it to effect the end of destroying the federal character of the constitution, and creating a

[1] That of New South Wales is nominee; in 1929 it was proposed that it should be elected by the members of the two Houses by proportional representation; its abolition is now contemplated.

[2] In July 1930 an Imperial Act validated the return to the western provinces of their natural resources, hitherto under federal control.

unitary system. This project on one view is incompatible with the power of change given by the constitution which must remain federal, and no referendum was actually held.

The system of law in Canada, except Quebec, Australia, New Zealand, Newfoundland, and the Irish Free State is based on the English common law. In the Union the Roman-Dutch law prevails, infected by the influence of English law, and in Quebec the basis of the law, now much modified by codification, is the French law of royal France. From the final courts of appeal resort can still be had to the Judicial Committee of the Privy Council, save that in the Commonwealth certain constitutional issues are excluded, namely all questions involving the relations of the Commonwealth and the States, or the States *inter se*. In such cases the final court is the High Court of the Commonwealth, unless it chooses to grant leave to appeal to the Judicial Committee, which it has done only once.[1]

§ 3. *The Federal Constitutions.*

The Canadian Federation of 1867 and the Commonwealth of 1900 differ in a considerable number of details, but both rest on Imperial Acts, both adopt responsible government for the federation and the provinces and States, and both more or less rigidly separate the powers of the federation and local governments. The salient differences are due simply to the fact that the aim of Sir John Macdonald and the leading framers of the Canadian constitution was union, federal institutions being a concession to necessity, while the framers of the Commonwealth constitution were anxious to preserve as fully as might be State rights, and were far more powerfully influenced by the American constitution than the statesmen who secured the British North America Act. The latter,

[1] Cf. *Ex parte Nelson* (1929), 42 Commonwealth Law Reports 258.

having before them the spectacle of the attempt of the southern States of the Union at secession, were determined not to run any risk of unduly strengthening State authority.

The provinces, therefore, were placed under Lieutenant-Governors, whose appointment rests with the Dominion government, and who are not in direct touch with the Crown, while in the States the Governors are appointed by the Crown and correspond direct with the Imperial government on all matters affecting the States. It was thought in Canada that this mode of appointment and the right of the Dominion government to remove meant that the Lieutenant-Governors were merely Dominion officers, and that they had no share in the royal prerogative; but this idea was dispelled by the Privy Council which allotted to them the full enjoyment of the prerogative so far as necessary for provincial government.[1] The laws of the provinces are subject to disallowance by the Dominion, while those of the States may be disallowed only by the Imperial government and are in no wise under Commonwealth control. But modern constitutional practice has reduced very considerably the actual extent of authority exercised in this way by the Dominion over the provinces; unconstitutional provincial legislation is normally now left to the Courts to pronounce invalid rather than disallowed, in view of the great uncertainty as to what legislation is or is not valid, and the invidiousness of the federal government thus seeking to define its powers as against the provinces.

The division of legislative authority between the local and central governments differs considerably in the two cases. The essential distinction is that residuary authority is granted in Canada to the federation, while the States of

[1] *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437; K. & L. p. 453.

Australia retain every power which they had as colonies, unless it is taken from them by the constitution, as in the case of the United States. The British North America Act, therefore, enumerates the powers of the provinces definitely, and sets out those of the federation but not exhaustively. The effect of the latter enumeration is that, where any matter *prima facie* falls within provincial authority and so would not be in federal authority, if it is enumerated as falling under federal power, legislation by the federation is valid and overrides any provincial legislation which may be passed otherwise validly on the same topic, for it is clear that from one point of view a matter may be federal, from another provincial. The provincial power extends to property and civil rights, the solemnization of marriage but not divorce, municipal institutions, provincial companies, public lands, prisons, hospitals, asylums, local works and undertakings, and generally all matters of merely local or private nature. Revenue may be raised by direct taxation, shop, tavern, and other licences, and loans may be raised; other revenue is provided by federal subsidies. Fine or imprisonment may be imposed for breaches of provincial enactments, and this involves the right to pardon, but the prerogative of mercy generally is delegated to the Governor-General alone, and criminal law is in the hands of the federation. But the provinces control the administration of justice, including the erection of courts civil and criminal, and civil but not criminal procedure. The federation, however, appoints the judges of all superior courts. Education is provincial, but the rights enjoyed as to denominational education by any classes of persons at the date when a province entered the federation must be respected, and, if separate schools are later created, interference with the system may give a right of remedial legislation by the federation. Both authorities can deal

with agriculture and immigration, but the federal law prevails. The federation has also a power to legislate to carry out the obligations of Canada under any imperial treaty, and claims to have the authority in so legislating to override provincial rights, but the matter is doubted.

The Commonwealth controls defence in all its aspects, the States being forbidden to maintain such forces without its assent. It alone can impose customs and excise duties, and can tax, but not so as to give a State any preference. It controls all foreign and inter-state trade, but not internal trade. It may deal with the post office, statistics, fisheries beyond territorial waters, lighthouses, quarantine, currency, legal tender, banking, bills of exchange, weights and measures, patents, copyright, bankruptcy, insurance, foreign corporations, marriage and divorce, invalid and old age pensions, naturalization and aliens, immigration and emigration, the influx of criminals, the control of railways for defence transport, and the construction of railways with the assent of the States. It may regulate the relations of the Commonwealth with the islands of the Pacific and external affairs, but this latter power is not held to include any power to override State laws, and accordingly no treaty can be accepted without the agreement of the States, which is not necessary, on one view, in Canada. On the topics assigned to the Commonwealth the States as a rule can legislate, but such laws yield to any federal law, so that immigration and naturalization, for instance, are really now in the hands of the federation. The federation may not give preference to any State by laws of revenue, trade, or commerce, nor deprive any State of the use of its water for conservation or navigation, or legislate on religion. The States may not discriminate between citizens of different States, nor interfere with freedom of commerce in the Commonwealth, nor make any thing but

gold or silver legal tender or coin money. As in Canada they depend considerably on subventions from the Commonwealth which has now taken over all their debts.

From the Courts of the provinces in Canada an appeal lies to the Supreme Court of Canada or to the Privy Council, and from the Supreme Court an appeal lies to the Privy Council which cannot be taken away as long as the Privy Council Act, 1844, is unrepealed, even in criminal cases. Hence all constitutional issues in Canada if of first-rate importance are settled by the Privy Council, which is the interpreter of the limits of federal and provincial rights. It is valued in Quebec especially as assuring that province protection for its religion, its right to have French as the official language of Quebec and the federal government equally with English, and the educational privileges of Roman Catholics in other provinces. On the other hand, in the Commonwealth the power to decide on any constitutional issue of the powers of the Commonwealth and the States or the States *inter se* belongs solely under an Act of 1907 to the High Court, and it, therefore, has decided the interpretation of the Commonwealth constitution. For a long period its interpretation was based on the American doctrines of the reserved powers of the States and the immunity of federal or State instrumentalities, but recently these doctrines have been discarded and English rules of constitutional interpretation have been adopted, considerably to the disadvantage of the States.

The Union of South Africa has no true federal characteristics in its constitution. The provinces exist at the mercy of the Parliament of the Union, which has already considerably altered their powers. Consistently with the position of the provinces as extended local government areas, they do not enjoy responsible government of the ordinary type but are administered by Administrators

appointed by the Union government and Committees elected on the principle of proportional representation by the elective provincial councils. Their legislation requires the assent of the Governor-General, and their Acts may at any time be overridden by Union Acts, and are only valid if within the sphere of local affairs as defined from time to time and not contrary to any Union legislation. The provinces have, of course, no control of the administration of justice and the Courts are entirely Union.

The provinces, however, are too deeply rooted in local feeling to be easy of abolition, and they have control of education other than higher education, receiving large Union subsidies. They serve also to play a part in the election of Senators, but on the whole, as in Canada and the Commonwealth, the Senate is not marked by any interest in local rights as such. In Canada the federal principle is somewhat feebly expressed in the Senate; the country is grouped as four divisions, Ontario, Quebec, the maritime provinces, and the western provinces with equal numbers (24) of Senators, but their nomination on purely political grounds for life by the government of the day prevents Senators developing any special provincial spirit. In the Commonwealth the mode of election by the whole State has resulted in fact in very little federal feeling among the Senators, so that the Upper House is not really, as in America, a States House.

§ 4. *The Imperial Conference.*

The mode of co-operation between the autonomous units of the Empire is the Imperial Conference, so named by resolution of the Colonial Conference of 1907, which also invented the name Dominion. It meets at irregular intervals but not less than once in four years, and is a gathering of the Prime Ministers of the Empire under the formal

Presidency of the British Prime Minister. It has no executive functions whatever and no power to legislate or even to arrive at decisions which will result in the members being pledged to give effect to them when they return to the Dominions. The decisions are essentially ad referendum; they need not be followed up if there is any change of government, and thus the Labour government of 1924 was fully justified in refusing to adopt the preference policy announced by Mr. Baldwin at the Conference of 1923. Nor even if there is no change need a government press on its legislature any proposals which it may find it inexpedient to proceed with. But it serves to allow of an exchange of views between the governments of the Empire, and to lay down principles of foreign policy which the British government will follow in those matters especially in which the Dominions are not directly concerned, such as relations with Egypt. The Conference has in some measure succeeded in harmonizing the interests of India with those of the Dominions, by conceding the right of the latter to exclude Indian immigrants, but suggesting that those Indians lawfully in residence should not be denied equal rights, and the settlement between the Union and India in 1927 was based on earlier doctrines laid down by the Conference. Its great achievement must be reckoned the definition of Dominion status in 1926. In war-time, of course, closer co-operation, but still on a footing of autonomy, was secured by the creation in 1917 of the Imperial War Cabinet, which in 1919 was in effect transformed into the British Peace Delegation at Paris. Through its efforts, the Dominions received recognition as distinct units in the League of Nations, and signed as such the treaties of peace, which were only ratified by the Crown after the Dominion Parliaments had concurred.

The economic side of the Imperial Conference has lately

been regarded as offering excellent prospects of permitting the evolution of a policy of inter-imperial free trade, but the prospects of substantial development on these lines are dependent, not merely on the possibility of converting the British electorate to a belief in taxation of foreign foodstuffs, but also on the adoption by the Dominions of the view that secondary industries should be sacrificed in order to give the British people some basis for the imposition of duties on food.

The contact daily of governments is now secured by direct telegraphic or written communication between governments, or, if preferred, via the Governors-General, whose use as an intermediary was rendered facultative by the Conference of 1926, and by the presence in London of High Commissioners for the Dominions, who are in part semi-diplomatic representatives, in part financial and commercial agents. The United Kingdom is represented by a High Commissioner at Ottawa, who acts much as does an Ambassador, but perhaps with more concern with economic co-operation, and since 1931 by a High Commissioner in South Africa, while Australia and New Zealand have liaison officers. So far as fullness of information is concerned, no complaint lies against the Imperial government, but so far it has elicited little effort at co-operation in foreign policy.

X

THE COLONIES

LIKE the Dominions, the colonies are part of the British dominions in the wide sense, being British possessions. They agree in all cases in being subject to the supremacy of the Imperial Parliament; but they differ greatly in the measure of internal autonomy, and the most important difference perhaps lies between those colonies in which the Governor is essentially responsible to the Crown for the administration, and those in which a measure of responsible government prevails.

§ 1. *Colonies with Local Self-government.*

These colonies differ from Newfoundland in that the latter has full self-government of the same general type as the other Dominions under the Imperial Conference Resolutions of 1926, and is a member of the Imperial Conference. On the other hand, they agree with Newfoundland in the fact that in foreign affairs they rely on the Imperial government, which acts for them and ultimately controls their interests in these regards; like Newfoundland, they have no membership of the League of Nations. Again, as in the case of Newfoundland, their constitutions rest on prerogative Letters Patent, not Imperial statute, though, unlike Newfoundland, they are colonies by cession or conquest, not by settlement.

Malta was given a measure of self-government in 1921 in order to meet the natural desire of the people to manage their own local affairs, despite the difficulties presented by the fact that Malta is a vital naval base. The result, therefore, is that the Maltese Parliament has limited authority. It may not deal with matters affecting the public safety

and defence of the Empire, and the general interests of British subjects not resident in Malta, including the control of naval, military, or air forces; defence including land acquisition; aerial navigation; submarine cables and wireless telegraphy; imperial property; external trade; currency and coinage; immigration; naturalization and aliens; postal and telegraphic censorship; passports and treaties with foreign States save in so far as local legislation may be necessary to put in operation treaty requirements. Religious toleration is essential, and English is given the leading position as the official language, except in the Law Courts, where Italian is the normal language, while Maltese is merely permitted. The legislature has constituent powers but no authority to alter the allocation of authority. On the reserved matters the Governor may legislate by Ordinance, or the Crown by Order in Council, and the alteration of the constitution as regards the distribution of powers, religion, and language, rests with the Crown which also is granted a civil list of modest dimensions. For the matters entrusted to Parliament, the Governor is advised by an Executive Council of Ministers, whose relations towards him are, by an innovation, declared by the constitution to be those of ministers in the United Kingdom to the King. Moreover, ministers are required to be in Parliament, the constitution leaving it dubious what power they have when Parliament is not in being. In reserved matters the Governor has the aid of a nominated Council, and he may summon a meeting of that body and the Executive Council as a Privy Council to consider issues not exclusively ministerial. The Parliament is composed of a Senate of seventeen members representing the Church, nobility, the learned classes, merchants, and trade unions, and an Assembly of thirty-two members elected on a low male franchise, with provision for meeting deadlocks by

joint sessions. In June 1930, owing to clerical intervention in the pending elections, it was necessary by Order in Council under amending Letters Patent to suspend the constitution and give legislative power to the Governor. The legal system is based on ancient custom and Roman law as interpreted in Italy, while alone of British territories it possesses a local nobility formally recognized by the Crown.

Southern Rhodesia received responsible government in 1923 after the annexation of the territory, formerly a protectorate administered by the British South Africa Company. The constitution is at present unicameral, elected on a suffrage which excludes most of the natives, and, accordingly, there is provision to control in some degree the administration to secure native interests. The Native Department is subject to the final authority of the High Commissioner for South Africa, an office separated in 1931 from the Governor-Generalship of the Union; his approval is requisite for appointments, removals, rates of pay, and changes of policy. Natives are provided with inalienable reserves, and as a rule may obtain and part with land on similar conditions to Europeans, but this policy has been modified so as to permit of a measure of setting aside of areas for the white and native races. Fines on chiefs require the High Commissioner's assent, and bills imposing restrictions on natives other than those applied to Europeans must be reserved, save in the case of rules as to arms, ammunition, and liquor. The High Commissioner is also given a veto on differential regulations not expressly authorized by a law. There is further provision to secure reservation of Bills taxing minerals, or dealing with mining revenues, intended to secure just treatment of the mineral rights of the British South Africa Company, while their railway interests are secured by the establishment of a

system of control of rates analogous to that provided in the Railways Act, 1921, in the United Kingdom. Subject to these restrictions, the country enjoys responsible government, ministers being given four months to find seats in the legislature.

Ceylon in 1930 agreed reluctantly to accept, in lieu of full self-government, an experimental constitution under which the business of government is to be carried on by a legislature of fifty members, elected on a very wide franchise extended to women, which will not merely legislate but, through committees, administer. The Governor will normally accept the advice of the Committees, but will have the right to refuse to act on it if he thinks it necessary, and will have reserved powers of legislation, and may declare a state of emergency and assume control of any department, e.g. police. The committees will be elected by the legislature, and will have chairmen, who will for budget and estimates purposes act together as a quasi-ministry; they will also have the aid of three nominated officers of State, Chief Secretary, Attorney-General, and Treasurer, who will be advisers, not controllers. Each committee will decide issues affecting the departments assigned to it; but its views may be rejected by the whole legislature in executive session, in which case it is expected that the minister will accept the adverse ruling. Resignation of the ministry will be expected only on rejection of their financial proposals after full consideration, or on a direct vote of censure. In case of failure of the scheme to operate, the Governor will have power to take over the administration of any department. Defence will, as hitherto, as well as foreign relations, and the interests of British subjects not resident in the island, rest with the Governor. He will also be empowered under directions from the Secretary of State to secure the position

of civil servants, though the proportion of Ceylonese will be largely increased, and legislation which is unfair to any minority will not be allowed. The constitution is so complex that it can be worked only by much mutual concession.

§ 2. *The Crown Colonies.*

This convenient term covers all those colonies in which the executive government rests in the hands of officers under the effective control of the Imperial government acting through the Governor. His relation to the legislature may vary greatly, from cases where he alone can legislate to those in which his power is merely that of recommendation of legislation and grant or refusal of assent or reservation. On this basis colonies may be divided as follows:

I. Colonies possessing an elected Assembly and a nominated Legislative Council: Bahamas, Bermuda, and Barbados.

II. Colonies possessing a Legislative Council, partly elected, without an official majority: Cyprus, and, since 1928, British Guiana, in so far as the fourteen elected members have against them ten officials and there are five nominated members.

III. Colonies possessing a Legislative Council partly elected, with an official majority: Jamaica, Leeward Islands,[1] Grenada, St. Vincent, St. Lucia, Trinidad; Fiji; Kenya, Sierra Leone, Gold Coast, Nigeria; Mauritius, and Straits Settlements.

[1] This is a federation of Antigua, Dominica, St. Christopher-Nevis, Montserrat, and the Virgin Islands, under an Imperial Act of 1871. Each has a local legislature, partly elective in Dominica, save that the Governor legislates for the Virgin Islands. The central legislature includes representatives of these Councils duly elected.

IV. Colonies possessing a nominated Legislative Council: Gambia, British Honduras (with an unofficial majority), Falkland Islands, Hongkong, and Seychelles.

V. Colonies without a Legislative Council: Ashanti, Basutoland, Gibraltar, Gilbert and Ellice Islands Colony, and St. Helena with Ascension.[1]

In the case of all these colonies save Bahamas, Bermuda, and Barbados, and the Leeward Islands and British Honduras, the Crown[2] has the right to legislate by Order in Council so that deadlocks are impossible, and the Governor can if necessary secure any legislation desired by the Imperial government, or requisite to make the administration work smoothly. Nor is there any difficulty in securing legislation in the Leeward Islands with an official majority, not only on the federal legislature, but also on the island legislatures of the group. In the other cases, the administration is conducted normally without much friction partly by the device of placing on the Governor's Executive Council representatives of the legislature, who thus help to keep the government and the legislature in touch. In Barbados under an Act of 1891, one Legislative Councillor and four members of the Assembly join with the Executive Council to form an Executive Committee, which alone can initiate money grants. In the Bahamas and Bermuda the ancient right of private initiation, long since dropped in other territories, remains legally in force. Jamaica, which

[1] Papua and Norfolk Island are administered by the Commonwealth of Australia. Aden and the adjacent protectorate are in civil matters under the government of India, in military under the Secretary of State for Air (1929), and politically under the Colonial Secretary.

[2] The Secretary of State for the Colonies controls the colonies, protectorates, protected states, and mandated territories except Southern Rhodesia, Basutoland, the Bechuanaland Protectorate, Swaziland, the Dominion Mandates and Nauru, which with the Dominions fall in the sphere of the Secretary of State for the Dominions.

had a distinguished history in early days of opposition to Imperial control, under its existing constitution has ten officials and five nominated members against fourteen elected members in its Council; but the elected members if unanimous can defeat any proposal, and any nine can veto any financial matter unless the Governor declares the issue of paramount importance to the public interest. Efforts to extend the control of the elected members proposed since 1922 have so far remained fruitless. Elsewhere a gradual introduction of election for a minority of members is the prominent feature of advance. The colonies, it must be remembered, are essentially so mixed in population that it would be unwise to entrust power to non-officials. The most conspicuous case now in dispute is that of Kenya, where the European residents have endeavoured to secure the control of the legislature, and have demanded that they should be conceded at an early date responsible government. In reply, the Labour government of 1930, no less than the Duke of Devonshire in 1923, asserted that the official majority must be retained, and that the paramount interest must be that of the natives, and immigration, whether of Indian or European, must be restricted if necessary in the interest of the natives. It has also pronounced in favour of the plan of a common franchise of a high character and a common electoral role for Indians and Europeans, removing the strong objections justly felt in India to the discrimination now practised against the Indians, who have only five seats against eleven European.

§ 3. *The Administration and Legislation of the Colonies.*

The power of the Crown to give constitutions to the colonies rests, as already noted, on the prerogative supplemented by statute. The prerogative only permitted the grant to a settled colony of a representative constitution,

and it was clearly impossible to create such a constitution in the Falkland Islands or the West African Settlements, so that the British Settlements Act, 1887, based on earlier legislation, permits the Crown to frame constitutions for such settlements, and to delegate legislative power to any three or more persons in a settlement. Any form of constitution can be granted to a conquered or ceded colony, but, if a representative constitution is given, it cannot be recalled nor can the Crown legislate thereafter for the colony, unless the power is expressly reserved. Such a reservation has been duly made in the case of Cyprus. For British Guiana special provision was requisite by Act of Parliament in 1928, and power to legislate by Order in Council is now reserved. Jamaica, Grenada, and St. Vincent once possessed representative constitutions, which in 1866 and 1876 they surrendered with the approval of Imperial Acts, and their present constitutions rest on these Acts.

The Governor in each case is appointed by the Crown and is given a delegation expressly or implicitly of all the prerogative power necessary for colonial government. He is not a Viceroy in the sense of the Lord Lieutenant of Ireland in former times, and he is therefore liable to suit both in respect of private liabilities wherever incurred, and of wrongful acts ordered or committed by him as Governor. To claims on the latter head he cannot reply by a mere allegation of Act of State, but must prove his legal authority for his actions.[1] There is no ground to doubt that he could be tried in his colony for a criminal offence committed there. He is also liable to suit in England for any tort committed in his government, provided that the action is analogous to a tort in England. But liability will be destroyed by a local Act of Indemnity, since the action

[1] *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102; K. & L. p. 457.

in the colony is thus deprived of tortious character.[1] He is also liable criminally in England for any acts of oppression or crime committed in his government, but recent cases of punishment are happily not on record. A vain effort was made to put the English law punishing murder committed overseas[2] in operation against the Governor of Natal for his share in the execution of natives in the rising of 1906, but clearly the liability of a Governor in a colony under responsible government is an anachronism.

In a Crown Colony the Governor is the motive force of the administration. He is advised by an Executive Council, composed of the chief officials and usually some nominated unofficials, who may include elected members of the legislature, but he commands the official votes and can usually carry his Council, nor, even if he cannot, is he bound by its views. The official members of the legislature must vote as he orders, and all departmental work of importance is brought before him. His formal authority includes the appointment of officers, but the more important posts are filled by men selected by the Secretary of State for the Colonies, and his power to suspend or dismiss is regulated by instructions. He recommends all financial legislation and initiates most of the legislation in the Council over which he normally presides. His assent is necessary for legislation, and he must reserve certain classes of Bills such as those affecting the prerogative, the rights of British subjects not locally resident, British trade or shipping, defence, currency, treaties, differential duties, &c. He exercises the prerogative of mercy, following a careful procedure in capital cases. All issues of public funds are under his warrant, and he summons, prorogues, and dissolves the legislature. He does not command any

[1] *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; K. & L. p. 426.
[2] *Governor Wall's Case* (1802), 28 St. Tr. 51.

military or naval forces in the colony,[1] but he is entitled to the aid of such forces in emergency in preserving order.

The legislatures of colonies have very wide powers, even when nominated or consisting only of the Governor himself. Security against misuse of these powers is provided by the Colonial Secretary's careful supervision of colonial administration, assured by his right to dismiss any Governor and order the dismissal of any officers, who all hold at pleasure. Colonial legislatures are not delegates of the Imperial Parliament in the sense that local bodies are;[2] they may delegate their powers of legislation to subordinate authorities as the Imperial Parliament does. In deciding what measures are necessary they are exempt from any control; their power is to legislate for peace, order, and good government, and no court can declare that any piece of legislation is not necessary, in contrast with the exercise of delegated powers by the executive in the United Kingdom. But there are limitations, which do not apply to the Imperial Parliament and as a result of the Conference of 1930 will disappear in the case of the Dominions. (1) They cannot legislate with extraterritorial effect save by special Imperial legislation, which allows them to control their registered shipping and coastal trade and their military forces overseas. (2) They cannot override any Imperial Act applying to the colony, as this is forbidden by the Colonial Laws Validity Act, 1865. (3) They cannot legislate to amend their constitutions, unless they comply with certain conditions. Colonies, whose legislature includes a house of whose members half are elective, may alter their constitutions, and in addition there are certain colonies whose constitutions are not now representative, but once

[1] Bermuda, Gibraltar, and Malta are exceptions.

[2] *Reg.* v. *Burah* (1878), 3 App. Cas. 889; *Hodge* v. *Reg.* (1883), 9 App. Cas. 117; K. & L. p. 413; *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282.

were so; it follows that the present legislatures retain their former power of constitutional alteration, and in fact Dominica has added elected members to her constitution, though the legislature was reduced in 1898 by its own act to a nominated body. In the Virgin Islands the Governor has legislative power, but still under this rule has also constituent power. The Colonial Laws Validity Act requires that any constitutional legislation should be passed subject to any restrictions laid down in the constitution, and, if legislation is passed disregarding this rule, it is invalid. (4) It is doubtful whether under the power of constitutional change a legislature may extinguish itself utterly, as this defeats the purpose of its creation. In point of fact all surrenders have been accompanied by Imperial legislation authorizing their acceptance by the Crown, as in 1866 in the case of Jamaica. The necessity for an Imperial Act for British Guiana in 1928 was due to the doubt whether the legislature possessed constituent power, and whether a majority for the surrender of the control of finance, then enjoyed by the elected members, could be obtained.

The basis of the law of the colonies is normally English, but in Ceylon it is Roman Dutch, which prevailed also in British Guiana, until replaced by the English common law in 1916; part of the older system remains in the field of real property. In Mauritius and Seychelles the basis is French law as under Napoleon but before the enactment of the Criminal Code. St. Lucia rests on the old French law of pre-revolutionary France, as it was acquired before the Napoleonic reforms. Cyprus has the Mohammedan Sacred Law and the Turkish Codes as they stood in 1878. These survivals are due to the rule of law that in conquered or ceded colonies the old laws remain until superseded by new enactments or changed by the decision of the new

sovereign. In Trinidad the original Spanish law has gradually been superseded by English law. In Southern Rhodesia, on the other hand, the system of Cape law was deliberately introduced, perhaps unwisely, but in order to keep the territory in touch with the rest of South Africa, under the British South Africa's Company's régime.

Judicial appeals lie in every case to the Privy Council, which thus ensures a high standard of judicial accuracy. The independence of the judges is secured by the rule that, though they normally hold at pleasure, they must not be removed from office save with the approval of the Secretary of State, who usually consults the Privy Council before agreeing to dismissal. In case of serious misconduct the Governor may suspend, when the issue will be decided by the Imperial government. The Governor in Council may also amove a judge under Burke's Act, but this procedure, which applies properly to judges holding during good behaviour, is inconvenient and obsolete. To ensure justice in cases of appeals, arrangements have been made for a West Indian Court of Appeal in 1919, and for such a Court for East Africa in 1921, and West Africa, 1928, whence a final appeal lies to the Privy Council; in other cases judges from adjacent colonies aid in appeals.

Each colony forms by itself a distinct unit, but of late steady efforts have been made by the Colonial Office to secure greater unity of administration. A large number of committees have been established in London to advise the Secretary of State on issues of tropical diseases, entomology, agriculture, veterinary science, and so forth, and the practice has developed of holding periodic Colonial Conferences[1] for the consideration of common problems. Suggestions for the unification of the colonial services have

[1] For that of 1927 see Parl. Papers, Cmd. 2883, 2884; of 1930, Cmd. 3628, 3629.

been made, but are yet inchoate. But a central audit of colonial accounts already exists to supplement and supervise the work of audits in the colonies, and the Crown Agents for the Colonies act as financial agents and purchasing agents for all the colonies and other territories under the Colonial Office and supply technical staffs. Appointments to other offices are made by the Colonial Office, in which a special department has now been set up to deal with appointments and promotions.[1]

[1] Parl. Papers, Cmd. 3554.

XI

PROTECTORATES, MANDATED TERRITORIES, PROTECTED STATES, AND FOREIGN JURISDICTION

§ 1. *Protectorates.*

THE Empire now includes a number of territories which resemble closely, in character of government, Crown colonies. There are protectorates attached to the Gambia and Sierra Leone for which the Councils of the colonies legislate. The complex territory of Nigeria is composed of a colony and two protectorates formerly independently administered, the Northern and the Southern Provinces. The Council legislates for the colony and the Southern Provinces, the Governor for the Northern Provinces. The Council of Kenya legislates for the small protectorate attached. Nyasaland and Uganda have nominated Legislative Councils of their own, and the Northern Territories of the Gold Coast and Somaliland, are legislated for by the head of the executive. Northern Rhodesia has elected members, but a majority of officials and nominated members, on its Legislative Council. The High Commissioner for South Africa legislates for Bechuanaland and Swaziland, and for the colony of Basutoland. The High Commissioner for the Western Pacific, who is also Governor of Fiji, issues regulations for the Solomon Islands, the Gilbert and Ellice Islands colony, New Hebrides, &c.

The essential feature which distinguishes these territories from colonies is that they do not form parts of British territory, and therefore cannot be governed under the prerogative as to conquered or ceded colonies. Instead they fall under the Crown's power of exercising foreign

jurisdiction. This was first placed on a statutory basis in a satisfactory form in 1843 when, in view of the needs of British communities in Turkey and China, it was provided that the Crown could exercise any jurisdiction which it had within a foreign country in as ample a manner as if the jurisdiction had been acquired by cession or conquest. Orders in Council therefore can be made to regulate jurisdiction, and under the Act of 1890, which now governs the position, the certificate of the Secretary of State is final as to whether any jurisdiction exists in any country. The original intention of the Acts was merely to direct the exercise of jurisdiction in those territories whose sovereigns formally conceded authority, and to apply it to British subjects; but the Acts were not expressly limited, and, when the administration of Cyprus was handed over to the Crown by Turkey under agreement in 1878, a constitution for the island was framed under these powers. When in the 'eighties it was found necessary to extend protection over African territories in order to prevent their occupation by foreign powers, and the Royal Niger, the Imperial British East Africa, and British South Africa Companies were established to secure British interests, it was felt proper to use the Foreign Jurisdiction Act to set up governments, and gradually the power was assumed to deal not only with British subjects but also with all foreigners and the natives themselves, without too close inquiry into the amount of jurisdiction actually possessed by or conceded by the chiefs in the territories thus taken into British protection. The territories concerned were steadily assimilated in administration to colonies and transferred from the charge of the Foreign Office to that of the Colonial Office.

The right of the Crown to make these Orders in Council has been completely established by decisions of the Privy

Council, though the basis of the decision in the latest case, *Sobhuza II* v. *Miller*,[1] which raised the issue of certain concessions in Swaziland, is not clear. The action of the administration there impugned was held valid either as an Act of State unchallengeable in any British court, or as attributed to statutory powers under the Foreign Jurisdiction Act. That Act refers to the existence of jurisdiction by treaty, grant, sufferance, and other lawful means, and regulates its exercise but does not create any jurisdiction, nor would it in many cases be easy to find treaties with rulers capable of granting jurisdiction. It follows, therefore, that in many cases jurisdiction must be ascribed to conquest,[2] and in fact large areas in Nigeria, for instance, were really so acquired. As against foreigners the exercise of jurisdiction is clearly in accordance with international law. Foreigners are deprived by the assumption of a protectorate from securing redress for grievances save through the protecting power, and that power is bound to assure adequate protection for life and property in the protected territory, and may assume jurisdiction, if that is the best way to attain such an end.

The process of civilization naturally tends to justify conversion of protectorates into colonies, as in the case of Kenya (1920) and the Gilbert and Ellice Islands (1915). The distinction, however, has what is sometimes reckoned an advantage, in that the Imperial Acts against slavery do not apply to protectorates; it is argued that where domestic slavery exists, as in the Sierra Leone Protectorate,[3] it is better to deal with it by local ordinance than to apply the early Imperial Acts. It is also thought that it would cause friction with the higher native chiefs, if they lost their

[1] [1926] A.C. 518.
[2] *R.* v. *Crewe*, [1910] 2 K.B. 576, 596.
[3] Parl. Papers, Cmd. 3020 (1928).

status as protected chiefs, and became merely British subjects, and this might be true of such potentates as the Emirs of Northern Nigeria, the Kabaka of Uganda, or the Paramount Chief of Bechuanaland. It is easier also in a protectorate to administer on the method of indirect rule, which has been carried to its highest pitch in Nigeria, and which seeks to act on the people through a native administration with its own treasury and courts supervised by British officers.[1]

§ 2. *Mandated Territories.*

Mandated territories, the creation of the Covenant of the League of Nations and the treaty of peace with Germany and that with Turkey, are a novelty in British constitutional law. The Covenant contemplated three classes of territories of which the first (A), formerly parts of the Turkish Empire, might provisionally be recognized as independent nations, subject to the rendering of administrative advice and assistance by the mandatory power. Iraq obviously fell under this description, and a draft mandate was drawn up on this basis. Iraq, however, objected to the system, and, in lieu of a formal mandate, a treaty of alliance was arranged in 1922, which was accepted by the Council of the League as sufficient to ensure the purpose of the mandate. This treaty was revised in 1926, as a result of the decision of the League that the mandate should be extended in consideration of the assignment of the disputed territory of Mosul to Iraq, and again in 1927, when a promise was given to recommend the admission of Iraq to the League of Nations in 1932 conditionally on progress being made to settled conditions. In September 1929 the conditions were waived and a promise given to

[1] Native law is regularly respected not only in protectorates but also in the West African Colonies and Kenya.

support admission in 1932, the treaty of 1927 being dropped, and the question of the terms of admission are now under the consideration of the League, which will have to decide the conditions of admission and the termination of the mandate. Under agreements with Iraq[1] the United Kingdom manages its foreign relations, supplies military and air defence to augment local resources, and aids the administration by the services of skilled supervisors.

Palestine was given in mandate subject to the requirement of the provision of a Jewish National Home, as promised by the Balfour declaration in 1917. It is difficult to meet the Arab contention that the promise was contrary to agreements on the faith of which their aid was given against the Turkish forces, and the inclusion of this obligation runs counter to the wording of the Covenant of the League, which must have been drawn up without regard to the declaration. The result has been that it is impossible to give the Arabs control over the government of the country, despite their numerical superiority and their capacity to govern themselves sufficiently for practical purposes. An effort to establish a legislative body in which ten officials would have been combined with eight elected Mohammedans, two Christians, and two Jews, broke down owing to Arab objections, and the government remains in the hands of the High Commissioner. The plenitude of his legislative power under the Order in Council has been asserted by the Privy Council,[2] according

[1] The latest, June 1930, contemplates that on admission to the League Iraq will assume full sovereignty and protection of foreign interests, that British forces will be withdrawn by 1937, and in lieu three air bases will be leased and protected by Iraqi forces. The constitution of 1925 gives Iraq constitutional monarchy with a Parliament.

[2] *Jerusalem and Jaffa District Governor* v. *Suleiman Murra*, [1926] A.C. 321. Contrary to the rule in colonies, the High Commissioner is exempted from the jurisdiction of the courts, as also in Tanganyika.

to whose ruling it is not for the Courts to limit his discretion as to the mode of carrying out the mandate. The deplorable riots of August 1929 have elicited a thorough investigation[1] by an impartial commission, which establishes that excessive Jewish immigration has resulted in the displacement of Arab cultivators, and in the creation of a landless class dangerous to progress. This error is to be remedied by restriction of immigration until by further development the land can be made fit to support larger numbers, and the aid of an impartial body, approved by the League, should render it possible to dispose justly of the issue of the rights of Jewish worshippers at the Weeping Wall.

Mandates of the second type (B) have been assumed by the Imperial government in respect of Tanganyika and portions of Togoland and the Cameroons. As authorized by the mandates, the two latter territories have been associated with the administration of the Gold Coast and Nigeria, and their distinct entity is recognized mainly by the reports duly rendered to the League, and the efforts made to estimate their revenue and expenditure as distinct areas, which is demanded by the League. Tanganyika has a Governor with a Legislative Council of thirteen officials and ten nominated members, while the Governor of the Gold Coast legislates for Togoland, and the Cameroons are legislated for as in the case of the Northern and Southern Provinces of Nigeria. One point of difficulty arises in regard to Tanganyika. The policy of the British government favours close grouping with Kenya and

[1] Parl. Papers, Cmd. 3530; for British policy, Cmd. 3582. It is now (21 Oct. 1930) proposed to revive the project of a legislature rejected in 1923. The area east of the Jordan is not treated as subject to Jewish rights, but under a treaty of 1928 is recognized as the State of Transjordan under an Amir with a constitutional government (1929), over which a considerable amount of control is retained by the mandatory.

Uganda under the control of a High Commissioner, who would exercise legislative and executive authority over certain issues, which would include railways and defence, harbours, roads, transport, and telegraphs. It is denied in Germany that such a measure of unification is permitted by the mandate, and it is clear that it is difficult to harmonize unified arrangements as to railways with the assignment to Tanganyika of its own revenue and expenditure, and that under the mandate forces raised in Tanganyika are only available for local defence, so that a unified military system would seem impossible of complete execution. The matter must ultimately be settled by the League, in virtue of the right of supervision exercised primarily through the Permanent Mandates Commission. That body, by its scrutiny of the annual reports presented to the League Council, ensures the maintenance of the mandatory system, and it is pointed out that, while in the case of Togoland and the Cameroons authority is given in the mandate to administer the areas as integral parts of the mandatory's territory, no such power is accorded as to Tanganyika, but merely the right to form a customs, fiscal, or administrative union or federation with adjoining territories, and that even this authority must be read as subject to the principles of the mandate.

Under both these types of mandate the mandatory is obliged to secure freedom of conscience subject to the maintenance of order and morals; the prohibition of the slave trade, the arms traffic, and the liquor trade; the prevention of the establishment of military bases and the training of natives for other than police and defence purposes; and also equal opportunities for the trade and commerce of other members of the League. The United States, though not a member, has secured by treaty a like

position. In the case of the third class of mandates (C), the last provision is omitted, without the assent of the United States, and the position approaches closely annexation. It is the condition of the mandates of the Union of South Africa, the Commonwealth of Australia, New Zealand, and the British Empire, over South-West Africa, New Guinea, Western Samoa, and Nauru. Administration is permitted as if the territory were an integral part of the mandatory's territory, and the Union aims at adding its mandate as a fifth province. It works the railways as a unit with its own; has, contrary to the spirit of the mandate, secured by agreement with Germany, of which that country now probably repents, acceptance of its citizenship by the German settlers there; has granted a large measure of autonomy to an administration with an elective legislature; and assumes that the interests of the natives can properly be subordinated to those of the European settlers, in accordance with the policy of the Union itself. The assumptions on which this policy is based have been criticized by the Permanent Mandates Commission, and the League of Nations has taken clear exception to the assertion,[1] based on the judgement of the Appellate Division of the Supreme Court of the Union, to which appeal lies from the territory, that the Union has sovereignty over the area.[2] As the only issue which was before the court was merely whether a native could be convicted for insurrection against the government, it might have been possible to avoid pronouncements on sovereignty. The issue in fact is incapable of solution; the German territories were placed under the control of the allied and associated powers, who allocated the mandates, which were approved by the League Council; the Permanent Commission is

[1] Boundary treaty with Portugal, 22 June 1926; Cmd. 2777.
[2] *R.* v. *Christian*, [1924] A.D. 101; *B.Y.I.L.* 1925, p. 211.

right in holding that it is inaccurate to speak of the sovereignty of the mandatory, and the Union Parliament in 1930 gave formal recognition of the objection by inserting a reference to the mandate in an Act amending the measure for the amalgamation of the railway system with that of the Union; but this change implies no alteration of unified control and pooling of revenue. Difficulty is promised by the prospect of annexation, which will require the assent of the League Council, on which Germany has a seat.

The legal authority over mandated territory rests, in the British view, on legislation under the Foreign Jurisdiction Act, 1890,[1] and this doctrine is accepted by New Zealand, which obtained such an order entrusting power to its Parliament, which again has delegated authority to an Administrator, aided by a legislature partly elected by the European population but under official control, while native views are elicited through a council of chiefs. In the case of New Guinea the legislative power rests with the Governor-General in Council, and is authorized either by the power under the constitution to administer any territory placed under the control of the Commonwealth, or by the Imperial Act of 1919 approving the treaty with Germany. In the Union it was held that the power of the Parliament to legislate for peace, order, and good government, covered the right to provide for the constitution of South-West Africa, or that as a mandatory the Union has sovereign power of its own right apart from the Union constitution. The doctrine has not been questioned in the Courts.

[1] In the case of Nauru, the Nauru Island Agreement Act, 1920, authorizes administration, which is at present in the hands of the Commonwealth.

§ 3. *Protected States.*

A curious outcome of eastern conditions has been the emergence of protected States whose foreign relations are under British control but which are internally autonomous. The Sultan of Brunei between 1842 and 1890 granted to James Brooke large areas of territory; these on the analogy of the claims of Parliament regarding India could only be deemed to have been acquired for the Crown, as Brooke was a subject. But in 1888 the knot was cut by a treaty recognition of the protectorate over Sarawak, the control of foreign relations and of the succession being reserved. With Brunei a similar agreement was made, but the right was also exercised of establishing consular jurisdiction for British subjects and foreigners accepting it, and in 1905–6, by a further agreement, the Sultan obtained a British adviser as in the Federated Malay States, who under the High Commissioner, who is also Governor of the Straits Settlements, in effect controls the administration. North Borneo is more anomalous, for it is administered by a chartered company, and yet is treated exactly like a protected State, the High Commissioner exercising control of external relations as Agent for Borneo. It must, however, be remembered that the charter, like any other charter, could be forfeited by the Crown for misfeasance, and the company is always ready to establish its capacity for sound government and regard for native interests. Zanzibar is also a protected State, the administration of which is carried on in the name of the sovereign, and not of the Crown, with the aid of a nominated Council, the administration being really controlled by the British Resident. Side by side with the Sultan's Courts, there is British consular jurisdiction, and from both sets of Courts appeals lie to the East Africa Court of Appeal.

In Malaya a remarkable system has evolved, since in 1874 the Governor of the Straits Settlements arranged with the Sultan of Perak for the reception of a Resident. That State, with Selangor, Negri Sembilan—a confederation; and Pahang, form the Federated Malay States since 1895; the governments are conducted in the name of the Sultans, but virtually by Residents. Since reforms in 1927, each State has a Council which exercises legislative authority in local matters, and a Federal Council, first created in 1909, deals with issues of common interest, under the supervision, through a Chief Secretary, of the High Commissioner at Singapore. Johore since 1914, and the other Malay States ceded by Siam in 1909 (Kelantan, Trengganu, Kedah, and Perlis), are now governed by their Sultans, advised by Residents, who do not, however, virtually govern as in the Federated States, and in these areas the Malays play a much more effective part in government. No use is made in any of the States at present of the Foreign Jurisdiction Act, and the Crown claims no jurisdiction.[1] The legal position is that sovereignty rests unimpaired with the Sultans, but they act on the advice of British Residents, who are subordinate to the High Commissioner and he to the Colonial Office.

The tiny Pacific kingdom of Tonga, with a constitutional monarchy, is a Protected State in which consular jurisdiction is actually exercised over British subjects and foreigners under a grant from the sovereign and the Foreign Jurisdiction Act.

§ 4. *Foreign Jurisdiction.*

The origin of foreign jurisdiction has been already mentioned. Its great importance lay in Turkey and China; in the former it was abolished under the treaty of Lausanne

[1] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797; K. & L. p. 316.

in 1924, and its gradual abolition in China has been promised. Persia in 1928 rid herself of it by declaration acquiesced in by the States entitled to it, and in Siam it was extinguished slowly by agreements, part of the consideration in 1909 being the renunciation of Siamese claims over the Malay States. It exists in respect of Abyssinia, Bahrein, Muscat and Kuwait on the Persian coast, Morocco[1] in a special form, and Egypt, where, however, it is limited for many purposes by the existence of the Mixed Courts, which deal with claims between foreigners of different nationalities and between foreigners and natives;[2] criminal jurisdiction and issues between subjects, including questions as to status, administration, &c., remain with the consuls. Since Egypt was recognized as independent in 1922, the protectorate, declared in 1914 to terminate relations with Turkey, under whose suzerainty Egypt was, has lapsed, but control over Egypt was formally reserved and is still exercised to secure British communications with the east, via the Suez Canal; the protection of the rights of foreigners and of minorities; and the Sudan. The latter territory is held in condominium by the United Kingdom and Egypt, but sole control rests with the Governor-General under the British government, and while, in 1930,[3] it was made clear that arrangements could be agreed to for the security of the canal, the entrusting of foreigners and minorities to Egyptian control, and the gradual disappearance of the capitulations under which extra-territorial rights are enjoyed by the United Kingdom and other powers, it was insisted that British control over the Sudan could not be abandoned.

[1] Tangier is under an international régime.

[2] They have a limited criminal jurisdiction over foreigners, and deal with land questions even between foreigners of one race.

[3] Parl. Papers, Cmd. 3575. Cf. Cmd. 3376. The use of the Nile for irrigation rests on an agreement of 7 May 1929.

In the New Hebrides there is a condominium between France and the United Kingdom, under which for certain purposes there is a joint form of government while for other purposes of control of their nationals both countries exercise their own jurisdiction.

XII

THE INDIAN EMPIRE

§ 1. *British India.*

THE reform scheme of 1919 established in the provinces a system of dyarchy, under which each provincial government, under a Governor, was divided into two sections, to each of which were assigned certain portions of the subjects allocated as provincial as opposed to central. Transferred subjects were to be administered by the Governor with the aid of ministers, reserved subjects by him with his Executive Council, consisting of equal numbers of officials and unofficials, but subject to the power of the Governor to override opposition in either case. The legislatures were largely increased, to give at least 70 per cent. elected members, and their powers were assimilated closely to those of colonial legislatures by affording control over finance. But the exercise of their authority was subjected to many limitations. Without the assent of the Governor-General no central subject can be dealt with, nor even on matters in the provincial sphere can an Indian Act be altered without such sanction. A Bill when passed requires not merely the assent of the Governor, but also that of the Governor-General, and may be reserved; in any case it may be disallowed by Order in Council. Nor is this control all. The Governor may legislate over the head of the legislature on any reserved subject, and may provide funds for both reserved and transferred matters, if the legislature refuses what he deems essential for the departments. Further, the Governor is bound in administration and legislation alike to safeguard the interests of depressed classes, of minorities, and of the civil services,

his sanction being requisite for any disciplinary action against a member of the superior services, of which the Indian Civil Service and the Indian Police Service are the most important. Moreover, while expenditure requires appropriations in the form of votes of grants, it is provided that expenditure authorized by law, sinking funds and interest on loans, and salaries of officers appointed under the authority of the Secretary of State, as well as the contribution formerly made to the central exchequer, need no votes. The Governor again decides in case of difficulty whether funds are to be allocated to one side of the government or another, and financial control rests with an Executive Councillor, though a Public Accounts Committee of the legislature secures due legislative insight into audit.

The failure of this system to develop ministerial responsibility or true party government is admitted in the report of the Statutory Commission, appointed to consider the working of the reforms and the possibility of advance. Parties have been more and more communal, and the government bloc of nominated members has regularly been used to secure some stability of government, thus destroying the slight possibility of the development of true political parties. Ministerial responsibility has seldom been attempted; as a rule the government has been worked on a unitary basis, ministers and councillors aiding one another, and presenting a united front to the legislature, thus destroying any possibility of attributing to ministers real responsibility. Irresponsible opposition in Bengal and the Central Provinces has on occasion resulted in the Governor being compelled to resume full control of the government, dyarchy being suspended. It is, therefore, not surprising that the Simon Commission should have recommended the abolition of dyarchy, the grant to provincial governments of unitary character, the Governor acting with ministers not

necessarily all elected members, who will act as a cabinet with joint responsibility. The Governor will remain personally responsible for securing the interests of minorities and the rights of the civil service, and in emergency the Governor, subject to the Governor-General's orders, may assume full control. The legislatures will be increased in size, the franchise being lowered to treble the electorate and add to the number of women voters; minorities will be protected by communal representation and depressed classes by the reservation of seats. Increased financial resources will be accorded to the provinces, whose legislatures will be given limited constituent powers with safeguards for minority rights. The re-division of India into more suitable areas is contemplated for the future and the separation of Burma, which should be made wholly independent of India, while a limited legislative power should be given to the North-West Frontier Province, which is too vitally associated with defence to be given a normal constitution. The subjects thus controlled would include the present transferred subjects—local government; education, other than European and Anglo-Indian; sanitation, public health, vital statistics, hospitals, asylums, and provision for medical education; public works, including light railways; development of industries; agriculture; civil veterinary questions, and co-operative societies; and the reserved subjects, land laws; famine relief; irrigation, water-supply and water-power; forests (transferred in Bombay); administration of justice, including civil and criminal courts; police and prisons; factory inspection and labour questions; and agency functions for the central government; relations with Native States and minor matters. It is clear that the division of subjects is not convenient, and that it is only the issues of law and order whose transfer to Indian control can cause anxiety, against which it is

proposed to provide by securing the position of the Indian Civil Service and the Police.

The central government as established under the reform scheme remains unitary, final authority resting with the Governor-General in Executive Council. The legislature was made bicameral, a Council of State of 60 members, 34 elected, and an Assembly of 145, 105 elected, but the Governor-General was given power to pass legislation over the head of one, or if necessary both chambers, and to secure funds if grants were refused. Moreover he could veto the discussion of legislation on any issue, and no appropriations are required for loan charges, salaries of officers appointed under the authority of the Secretary of State, political, ecclesiastical, or defence expenditure. But by a convention the right was conceded to the legislature and the government of India acting in agreement to determine fiscal policy, and accordingly a policy of protection against British cotton and other imports has been adopted to the detriment of British trade. Nor is the principle of a British preference accepted.

It is not proposed in the Simon Report to accord any measure of responsibility in the central government. But it is suggested that the legislature should be remodelled in view of federal evolution in India. The Assembly, therefore, would be reconstituted as a Federal Assembly with numbers based on population, the provincial Councils electing representatives by proportional representation so as to secure minority representation. The Council of State would endure, its elected members being also elected by the local legislatures. The financial powers of the legislature would remain, but the Assembly would be given the right to vote indirect taxes to be collected by a central agency, the net proceeds of which would fall into a provincial fund to be divided among the territories

represented in the Assembly, in which the North-West Frontier Province and Baluchistan would be represented.

The obvious obstacle to further progress towards responsible government lies in the question of the defence of India from external aggression, especially on the north-west frontier, where the country is and always has been extremely vulnerable, and the cognate issue of the maintenance of internal order. The Indian claim that India can now dispense with Imperial forces is wholly impossible of acceptance, but the modified view that British troops might be placed under ministerial control is unsound, for experience even in New Zealand in 1861–9 and in Natal in 1906–8 shows the dangers of allowing troops to be in any degree used to enforce a policy for which the Imperial government is not responsible. The Simon Commission Report suggests that army matters should be placed under Imperial control, the Governor-General acting without his Council and being advised by the Commander-in-Chief, who would cease, therefore, to be a member of Council. Troops would have to be made available for repression of civil disorder, but only with the consent of the Governor and on financial terms which would ensure that the use of troops was not resorted to in order to save expense. It cannot be denied that for internal purposes the deep-seated and, of late, embittered feuds between Hindu and Mohammedan render it difficult to employ other than British soldiers without exposing the Indian troops to painful situations, and the alternative of the provision by the provinces of local forces to maintain order would be ruinously expensive to a very poor country, in urgent need of social reform and expenditure on health, local government, education, agriculture, and industrial development. Full self-government demands the existence of armed forces capable of maintaining local order, and, in the view

of many politicians, also of meeting foreign aggression on land, leaving sea defence as an Imperial burden. To comply with these issues at any date needs the steady development of the Indian Army, but the process of Indianization must be slow in the absence of any eagerness on the part of Indian youth to embrace the martial career now made open.

The Commission contemplates the continued recruitment by the Secretary of State of the security services, including the Indian Civil Service, the Indian Police Service, and perhaps the Irrigation and Forest Services, and the protection of their members from unfair treatment. In addition to the existing Public Service Commission which safeguards All-India services, there should be statutory bodies for the provincial and subordinate services, and the High Courts should become a central charge, being taken out of provincial control in all cases. This is a natural corollary of the grant of extensive power to the provincial ministries, which should be subject to judicial supervision.

The scheme would involve the relaxation by the Secretary of State of all control over provincial governments save in so far as he would continue to control at his discretion the central government and in so far as the Governor may find it necessary to act without ministers. The Council of India would become advisory but would be allowed its present control of conditions affecting the services and non-votable Indian expenditure.

§ 2. *The Indian States.*

The Indian States present the most varied relations with British India, varying from great states like Hyderabad and Mysore to negligible feudal fiefs, but in one respect they agree; their relations with the Crown are not those of

international law, and rebellion against the Crown is treason, not an act of war. This position has been challenged by Indian rulers, but it is clear that the British Crown has succeeded to the paramount power over India once possessed *de jure* and *de facto* by the Mogul Emperors, then acquired *de facto* by the East India Company for the Crown, and finally assured to the Crown *de jure* by the disappearance of the Emperor. The Company in its earlier days sometimes treated on the basis of equality, but it soon altered its forms to those of paramount authority, and all Indian States have long acquiesced in the actual exercise of paramount power, which in 1926 was asserted in striking terms when the ruler of Hyderabad strove to reopen the issue of the surrender to the Indian government of Berar. But it is clear that the relations of the princes are ultimately with the Crown, as advised by British ministers, and that it would be impossible, as the Butler Committee reported, to transfer the control of the States without their assent to a government of India responsible to a legislature representing British India. The reform scheme recognized that a federal solution must ultimately be evolved, but the sole outcome was in 1921 the creation of a Chamber of Princes which has purely consultative and advisory functions. Its existence, however, marks the end of the traditional policy of keeping the princes jealously apart, and has added greatly to their harmonious co-operation, despite the abstention from active membership of Mysore and Hyderabad. It comprises as members in their own right 108 princes ruling over 514,000 square miles and nearly sixty million people, with twelve representatives of 127 minor chiefs with eight million subjects and 76,000 square miles. The Simon Commission suggests that the way to an ultimate federation may be paved by a Council with deliberative and consultative

functions representing British India and the States, which would discuss issues affecting such questions as customs, salt taxation, railways, air communications, trunk roads, posts and telegraphs, wireless, currency, commerce, banking, insurance, opium policy, Indians overseas, and the participation of India in the work of the League of Nations. As matters stand, India is represented as a unit in the League, and a spokesman of the States is included in the delegation to the Assembly. As the States maintain local forces both for police purposes and co-operation in Indian defence, and as they are entitled to military protection in case of need from the paramount power, it is suggested that, if the army is taken under Imperial control, a Committee on Army Affairs should be set up on which both the Central legislature and the States might have representation to keep in touch with the Imperial authorities.

Internally the greater States possess a large measure of autonomy, extending in some cases to the infliction of capital punishment without control from the British Resident or Agent, who is placed normally at the capital of the State and is able to offer advice on behalf of the Governor-General in Council, with whom all important States are in direct relations, though some minor States deal with the provincial governments. Intervention by the government of India is justified in any case of serious misgovernment, of disputed successions, of local insurrection, or of hostility to the Crown. In many cases by treaty or practice much greater control is exercised, especially during a minority, and in case of personal misconduct by a prince he may be removed; but the State is continued without annexation in accordance with the policy adopted after the mutiny, which in part was provoked by Dalhousie's policy of extending the area of British territory in the interest of the natives. Jurisdiction is ceded by the

princes in case of the residencies, of railway lands in the interests of railway connexions, of cantonments for British forces, and in many cases it is agreed that European British subjects shall be punished only by a British Court established on the territory or in British India. The telegraph system is in British hands, and in the main the posts and coinage, but some States have preserved rights in these matters. Local import and export duties are within the power of the States except Mysore, but no drawbacks are given in respect of goods subjected to the customs in British India, a fact which gives the States a vital interest in the tariff policy of British India.

Legal authority as to the Indian States rests in part on Orders in Council issued under the Foreign Jurisdiction Act, and partly on the powers of the Indian legislature, which extend not merely to legislation for British India but to legislation for British subjects and servants of the Crown everywhere in India, to native British Indian subjects everywhere, to the Indian forces where the Army Act is not applicable, and to Indian naval forces. Part of the conventional law of India requires the States to assist the operation of legislative power when duly enacted. Constitutional changes in the States in the direction of responsible government have yet not developed beyond advisory legislative bodies, and there is normally no sufficient division between the public revenues and the privy purse; there is a lack of independent judiciaries, and of security of personal liberty and property rights. The government of India, however, has no power directly to compel change, and its position is delicate. Princes who have loyally kept their obligations towards the paramount power have a right to aid against internal insurrection, and, when unrest is caused by demands for a more responsible form of government, a situation of complex

character presents itself, analogous to that which has arisen in Egypt, where the duty of the British government to secure order in the interests of foreigners involves it in a measure of responsibility for enabling the King to violate the constitution, and to govern with a Parliament in flat defiance of his oaths.

One subject interests the Indian princes equally with British India and has evoked complete harmony between them, the disabilities of Indian subjects in the British Dominions. Though accommodation has been reached in so far as acquiescence in exclusion has been rendered necessary, the issue is one of cardinal importance in rendering the permanent association of India with the Dominions difficult and dubious, while dangerous reactions were created in India, very justly, when for a time it seemed as if East African policy were to be dictated by the European settlers in East Africa, backed by the opinion of South Africa, with its doctrine of the subservience of native races to the promotion of European happiness.

The legal systems of the Indian States rest on the two great native systems of law, Hindu and Mohammedan, and these systems are extensively observed in British India in the wide fields of personal and religious law, including the vital issues of inheritance and of land law. Criminal law, however, could not be maintained and is now represented by the Penal Code, while contracts are governed by a code, and, by legislation and the action of the Courts in accordance with it, large masses of English law have been introduced, but the common law has never been generally introduced into India. Much of this legislation and codification has been adopted by the East African and eastern colonies and protectorates, whose adoption of English law is therefore of that law in a modified form more adapted to the needs of territories with mixed races.

§ 3. *The Round Table Conference.*

Definite progress towards defining the mode in which the government of India should evolve was made at a Round Table Conference[1] held in London from 12 November 1930 to 19 January 1931. The Conference represented an effort to secure the greatest measure of agreement between the representatives of the British political parties and the leaders of the various aspects of Indian political thought, including as an essential factor representatives of the views of the Indian Princes. While the functions of the Conference were purely advisory, it was found possible to secure a large measure of agreement affording the basis for the working out of a constitution. Unexpectedly it proved that the Princes were willing to accept as fundamental the view that the central government should be a federation of All-India, embracing both the Indian States and British India in a bicameral legislature. The Princes indicated readiness to agree to submit to the control of the central authority a list of subjects based on the list of central subjects under the existing constitution, the subjects ceded to be defined in agreements to be entered into when each State joins the federation. In all matters not so ceded, the Princes will retain their existing powers, and their relations with the Crown will be conducted through the Viceroy personally, not acting with the Executive Council of the federation. This safeguard, it may be noted, may prove illusory, for the Viceroy and the Crown cannot fail to be influenced strongly by the views of a federal ministry responsible for the welfare of the greatest part of India on any issue which may affect the interests under their charge.

With a legislature constituted on a federal basis the

[1] Parl. Papers, Cmd. 3772 and 3778.

British government will accept the principle of the responsibility of the executive to the legislature, though the Conference showed a disposition to consider that the ministry need not necessarily be expected to resign on the defeat of its measures. It was recognized that difficulty must arise from the fact that the federal government would also deal with certain matters which are central but may not be ceded by the States, so that a government might be defeated on a central issue through the States' representatives refusing to vote. No solution for this difficulty was reached. But, as a means of rendering cession of control to the federation easier, in certain cases it was contemplated that the federation should control policy and legislation, but that the States should retain administration in their hands.

The introduction of responsibility cannot extend under existing conditions to the control of external affairs and defence, and the constitution must give to the Governor-General the necessary powers, including financial resources, to carry out effectively his duties in these respects. He must also have authority, and means of enforcing that authority, to maintain in a case of emergency the tranquillity of the State and the observance of the constitutional rights of minorities. There must also be secured the fulfilment of the obligations in finance incurred under the authority of the Secretary of State, and the maintenance unimpaired of the financial stability and credit of India. This will entail the creation in due course of a Reserve Bank to control currency and exchange, while the service of loans, sums requisite for the reserved departments, and salaries and pensions of officers appointed under guarantees from the Secretary of State shall be charged on the Consolidated Fund. The Governor-General must also have power to check borrowing or currency changes, if necessary to prevent prejudice to India in the money

markets of the world. Special importance, however, attaches to the principle that ministers must not rely on the extraordinary authority of the Governor-General to evade responsibility.

The connexion between control of defence and responsible government led to agreement in recommending that, with the development of the new political structure in India, the defence of India must to an increasing extent be the concern of the Indian people and not the British government alone. Accordingly, it was desirable to hasten the Indianization of the Indian Army, subject to the necessity of securing efficiency, and with that end in view to expedite the establishment of a training college to train candidates for commissions in all arms of the service, including prospective officers of the Indian State forces, while Indian cadets should remain eligible for entry at Sandhurst, Woolwich, and Cranwell. Expert investigation of the possibility of reducing the proportion of British troops in India was also urged, but Lord Reading emphasized the danger of any rash action. A constitutional point of importance was raised for the States, which pointed out that the power of the Crown to carry out its specific obligations towards certain States must not be lessened.

Agreement was reached as to the necessity of the introduction of responsible government in the provinces, the range of provincial subjects being so defined as to give the ministries the greatest possible measure of self-government, the intervention of the central government being confined to the object of securing the administration of federal subjects. The Governor will be given only the minimum necessary powers to secure in exceptional circumstances the maintenance of tranquillity, and to guarantee the maintenance of rights provided by statute for the public service and minorities. It will be necessary to enlarge the

legislatures and grant a more liberal franchise in view of the increased powers to be accorded to them.

The new system will vitally affect the public services. It was agreed that recruitment for the Indian Civil and the Indian Police Services should continue on an All-India basis, but there was division of view as to whether European recruitment should continue at all or in a reduced measure, and whether the government of India or the Secretary of State should control recruitment. There was agreement that in the central and provincial governments there should be Public Service Commissions, charged with recruitment so as to secure a fair representation of the various communities consistently with considerations of efficiency. Their members will hold office at the pleasure of the Crown, acting through the Governor-General and Governors, and on these officers is laid the duty of consulting the Commission before deciding on appeals by officers against orders for suspension, dismissal, or other censure or punishment. No barrier of community, caste, creed, or race is to be permitted in the public services.

The question of the political representation of minorities proved insoluble, though agreement between Hindus and Mohammedans was almost reached. The spokesmen of the minorities and the depressed classes made it clear that, unless their demands were reasonably met, they could not consent to any self-governing constitution. It was recognized that it might be necessary to fall back on separate electorates despite the objections to this course. These include the extreme difficulty of adjusting fair proportions of representation, and the fact that the system hampers the growth of political parties or independent public opinion, while a further complication is created by the demand of the depressed classes to be deducted from the Hindu community and given distinct representation. The questions

must be solved by agreement among the communities, but the British government has recorded its intention to insert provisions guaranteeing to the various minorities in addition to political representation that differences of religion, race, sect, or caste shall not themselves constitute civic disabilities.

The proposals clearly contemplate giving to the Governor-General and the Governors responsibilities which it will be extremely difficult if not impossible for them to execute, with the result, as Dominion precedent shows, that in practice they will largely act on the advice of their responsible ministries even on issues in regard to which they have in theory independence. Special importance, therefore, attaches to the framing of the constitution in such a way that minorities may be protected by the Courts or by some procedure which does not involve personal intervention at the discretion of the head of the government. The representatives of European commercial interests accordingly secured general agreement in the principle that there should be no discrimination between the rights of the British mercantile community, firms and companies, trading in India and the rights of Indian-born subjects, and that an appropriate convention, based on reciprocity, should be entered into for the purpose of regulating these rights. It was also agreed that the existing rights of Europeans as regards criminal trials should be retained. The convention suggested would be an innovation of an important kind in the constitutional law of the Empire; it would give European British subjects in India the same complete equality of treatment which Indian British subjects enjoy in the United Kingdom, establishing a doctrine of the utmost importance in the promotion of Imperial unity of sentiment and interests alike. Divergences of opinion as to its interpretation could be settled by an inter-imperial

tribunal, and British trading interests would thus be far more effectively secured than they could be merely by the sporadic intervention of the Governor-General or Governors.

The principle that Burma should be separated on suitable terms from India, and given a measure of increased self-government, analogous to that which would be granted to India, was approved. It was agreed also that the North-West Frontier Province should be given, with certain safeguards and limitations, the status of an ordinary Governor's province, while the creation of Sind into a distinct province was approved in principle subject to further consideration of the feasibility of such action.

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